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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT L. HERNANDEZ,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Commissioner of Internal Revenue incorrectly interpreted Section 170 of the Internal Revenue Code of 1954 in reversing seven decades of prior IRS policy and disallowing charitable contribution deductions for payments made by Members of the Church of Scientology solely to participate in religious services of their faith.

2. Whether denying charitable contribution deduction under Section 170 for payments by Scientologists to participate in their faith's religious sacraments violates the religion clauses of the First Amendment.

RULE 21.1(b) LIST OF PARTIES

In addition to the named petitioner, Robert L. Hernandez, other parties who will be bound by the judgment in the court below are as follows:

1. Richard L. Best
2. Michael R. Carlson
   Martha A. Carlson
3. David Everson Dyer
4. Evo J. Gramolini
   Dorothy A. Gramolini
5. John Cutter Hearsey
   Polly R. Andrian
6. Bernard Milton Percy
   Carolyn Bell Percy
7. Robin A. Robinson

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IN THE

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OCTOBER TERM, 1987

No. 87- ——

ROBERT L. HERNANDEZ,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Robert L. Hernandez respectfully prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the First Circuit entered in the above-entitled matter on June 1, 1987 and the order of that court denying the petition for rehearing entered on July 15, 1987.

OPINIONS BELOW

The opinion of the court of appeals in this matter is reported at 819 F.2d 1212 and is reprinted in the Appendix to this petition (1a).[1] The order denying rehearing

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[1] References in this petition are indicated as follows:

To the numbered pages of the Appendix to this petition (——a); To the volume number and numbered pages of a four-volume Stipulated Record on Appeal, filed in the court below (Stip. Rec. ——

is not reported but is reprinted in the Appendix (30a). The opinion of the United States Tax Court in the case designated by the parties as providing binding factual and legal findings in this case is reported as *Graham v. Commissioner*, 83 T.C. 575 (1984) and is reprinted in the Appendix (31a). The Order and Decision of the Tax Court in petitioner's case is also reprinted in the Appendix (43a).

JURISDICTION

The judgment of the court of appeals (for which jurisdiction was invoked under 26 U.S.C. § 7482(a)) was entered on June 1, 1987 and a timely filed petition for rehearing and suggestion for rehearing *en banc* was denied by order entered on July 15, 1987 (30a). By order dated October 6, 1987, Justice Brennan ordered that the time for filing this petition be extended to and including December 12, 1987 (42a).

The jurisdiction of this Court to review the judgment of the First Circuit is invoked in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Internal Revenue Code of 1954 (26 U.S.C.) § 170—Charitable, etc., Contributions and Gifts [2]

(a) Allowance of deduction.

(1) General rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection

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——); To the numbered pages of the Supplemental Appendix filed with petitioner's main brief in the court below (SA ——).

[2] Only those portions of 26 U.S.C. § 170 and 26 U.S.C. § 501 relevant to the discussion in this petition are set forth here.

(c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

* * * *

(b) Percentage limitations.

(1) Individuals.—In the case of an individual, the deduction provided in subsection (a) shall be limited as provided in the succeeding subparagraphs.

(A) General rule.—Any charitable contribution to—

(i) a church or a convention or association of churches.

* * * *

shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year.

* * * *

(c) Charitable contribution defined.—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of:

* * * *

(2) a corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

References to Title 26 United States Code are to the Internal Revenue Code of 1954, which was in effect when the tax returns at issue in this case and related cases were filed and when the Commissioner's notices of deficiency were issued. As part of the Tax Reform Act of 1986, the 1954 Code was redesignated the Internal Revenue Code of 1986. Pub. L. 99-514 § 2(a), 100 Stat. 2095. The portions of Sections 170 and 501 of the 1954 Code pertinent to this case were not changed by the Tax Reform Act of 1986 and remain in force in identical form.

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate, in or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * *

Internal Revenue Code of 1954 (26 U.S.C.)
§ 501—Exemption From Tax on Corporations, Certain Trusts, Etc.

(a) Exemption From Taxation.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

* * * *

(c) List of Exempt Organizations.—The following organizations are referred to in subsection (a):

* * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety,

literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

STATEMENT OF THE CASE

The Nature of the Proceedings

Petitioner Robert L. Hernandez was denied an income tax deduction of $7,338.00 in payments for contributions to his church, the Church of Scientology, and was assessed a tax deficiency in the amount of $2,245.00 for the tax year 1981 (SA 4, 6).

Along with hundreds of similarly situated Tax Court petitioners who had contributed sums of money to various churches and missions of the same religious denomination, petitioner waived trial and, subject to his right of appeal, agreed to be bound by the outcome of similar "test" cases. The Commissioner of Internal Revenue (the "Commissioner") and the petitioner stipulated in the Tax Court that such designated cases were typical and that, to the extent relevant, the record of those cases was to be incorporated into the record of all proceedings in petitioner's case (SA at 8).

This case has arisen in a somewhat unique procedural posture. As indicated, both parties below agreed to be bound, subject to the right of appeal, by the relevant factual and legal findings of the Tax Court in a desig-

nated case, *Graham v. Commissioner*, 83 T.C. 575 (1984). The Tax Court ruled in favor of the Commissioner in *Graham*, and on the authority of that decision entered its judgment in favor of the Commissioner in petitioner's Tax Court case. (43a). Petitioner then filed a timely notice of appeal from the Tax Court's decision and appealed to the United States Court of Appeals for the First Circuit which affirmed the decision of the Tax Court.

Appeals similar to petitioner's have been decided by or are pending in all other United States Courts of Appeals except the appellate courts for the District of Columbia Circuit and the Federal Circuit.

Three other courts of appeals have issued opinions in appeals based on records identical to that of the instant case and raising the same legal issues. Like the First Circuit in this case, panels of the Fourth and Ninth Circuits subsequently affirmed the Tax Court's decision. *Miller v. Internal Revenue Service*, 829 F.2d 500 (4th Cir. 1987) and *Graham v. Commissioner*, 822 F.2d 844 (9th Cir. 1987). The Eighth Circuit, however, expressly rejected the First Circuit's analysis and reversed the Tax Court's holding that similar payments were properly deductible. *Staples v. Commissioner*, 821 F.2d 1324 (8th Cir. 1987). The Commissioner unsuccessfully sought rehearing in the Eighth Circuit in *Staples* and has now requested an extension of time for filing his petition for certiorari in this Court. The taxpayers' petitions for rehearing were denied in *Miller* and in *Graham*.

Statement of Facts

The parties have stipulated that Scientology, the faith whose sacraments are at issue here, is a religion (55a, ¶ 52) and that the recipients of the contributions, the relevant Scientology missions and churches, were, at all relevant times, churches within the meaning of Internal Revenue Code § 170(b)(1)(A)(i) and tax-exempt religious organizations under § 501 of the Code eligible to receive contributions deductible under § 170. (55a-56a, ¶ 53.)[3]

The payments at issue in this case are made for a core religious practice of the Church of Scientology known as "Auditing." Specifically, the record, through the detailed stipulations of fact, established that parishoners of Scientology are taught that "the individual is an immortal spirit who has a mind and a body" and "that the highest level of spiritual ability and awareness can be obtained only by progressing on the step-by-step basis through lower and intermediate levels of Auditing." (48a, ¶ 16.) "Every Auditing session is structured and conducted in exact accordance with rituals, codes, doctrines and tenets of Scientology" (48a, ¶ 15). No subject matter is taught, studied or learned during auditing. (49a, ¶ 23.) Dr. Thomas Love, a professor of religious studies at California State University at Northridge, California, gave his uncontradicted expert opinion that "auditing," the service for which the bulk of contributions involved were made, is "the essential religious experience of the Church of Scientology," comparable to beliefs and practices in Eastern religions, specifically Hinduism and Buddhism. (Stip. Rec. III 390-397.)

The Church of Scientology engages in another religious practice also at issue here known to Scientologists as "training." In training parishoners study "the doctrines, tenets, codes, policies and practices of Scientology" (49a, ¶ 24), and study the scriptures of Scientology to the exclusion of all other materials. (Stip. Rec. II 206, 219, 225-26, 229.) As part of training, a person may audit others. (Stip. Rec. I 19-20, 112, 140; II 219, 222.) The purpose of undergoing training is to achieve religious enlightenment and the ability to help others (including the

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[3] The parties' stipulations in *Graham v. Commissioner*, incorporated by reference in the proceedings below, are reprinted in the Appendix to this petition (46a-56a).

ability to audit another person). Dr. Love gave uncontradicted expert testimony that "training" is a form of religious observance, comparable to devotional study of sacred texts in the Buddhist and Judaic traditions (Stip. Rec. III 400-404). Scientologists believe that the spiritual benefits and awareness derived from auditing and training accrue not only to the individual but also extend to the public at large. (Stip. Rec. II 213-14, 223, 238, 260-61, 274-75, 298.)

In accordance with those stipulations and testimony, the Tax Court found the practices at issue to be religious. *Graham v. Commissioner*, 83 T.C. at 580 (37a) ("[P]etitioners wanted to receive the benefit of various religious services provided by the Church of Scientology").

The Churches of Scientology have established charges for auditing and training and refer to the payments of such charges as "fixed donations" or "fixed contributions." (51a, ¶ 36). Such fixed donations are the payments at issue here. (52a, ¶ 40). Auditing is given in sessions. An "Intensive" is a specific number of hours—12½ or 25—of Auditing intended to be given over a short period of time. (49a; ¶ 21). Fixed donations are sometimes made for an Intensive of 12½ or 25 hours of Auditing. (51a, ¶ 37). These donations, which are based upon a religious tenet of Scientology called the Doctrine of Exchange, constitute the source of most of the funds of the Churches of Scientology and are used to pay the costs of church operations and activities. (51a, ¶ 39). See also Stip. Rec. II 244-47, 294-95.)[4] Amounts of fixed donations have been set historically at levels that correspond roughly to a percentage of the income of church members. For example, the Tax Court below found that 25 hours of auditing has historically been set at the equivalent of three months' pay for average middle-class church members. *Graham*, 83 T.C. at 578 n.7 (34a).

[4] The Doctrine of Exchange is based upon early writings of the Founder of the Church of Scientology concerning the need to balance inflow and outflow within and between the dynamics (or, put another way, the need to give as well as receive.) (Stip. Rec. II 244-45, 297-98). A person must outflow to maintain a balance and to be an ethical Scientologist. (Stip. Rec. II 297-98). A person who does not contribute or exchange something will suffer spiritual decline. (Stip. Rec. II, 244, 297-98).

The taxpayers testified that they had made their payments so that they or their children could participate in religious services. (Stip. Rec. II 261-62, 303-04; III 355-56.) They also made their payments because they wanted to support the religious goals and projects of their church. (Stip. Rec. II 261-62, 303; III 355.) None of the taxpayers in the designated cases tried below nor the petitioner here received any material goods or secular services with respect to the payments at issue.[5]

The Commissioner's position in this case is that payments by individuals to participate in the religious sacraments of their church may be disallowed depending on the form of such payment and the nature and value of

[5] Beginning in 1978, the Commissioner of Internal Revenue has attempted to disallow petitioner's deductions for payments made to participate in the religious sacraments of his church based on three different theories. First, the Commissioner issued a Revenue Ruling that would have disallowed as charitable contributions fixed donations paid by Scientologists to participate in the religious sacrament of auditing on the ground that the donations were for "education" and therefore were comparable to payments for tuition at a private or church school. Rev. Rul. 78-189, 1978-1 C.B. 68. Second, in assessing petitioner for the tax deficiency at issue here, the Commissioner contended that the contributions were not made to an organization eligible to receive deductible contributions. (SA 7).

Both of these theories have since been abandoned by the Commissioner in the stipulations applicable in this case. As set forth above, the Commissioner has stipulated that the recipient of the donations here is a tax-exempt church eligible to receive deductible contributions and that auditing is a religious service, not an educational endeavor.

the religious service provided. The Tax Court agreed and the First Circuit affirmed.

The panel below held that payments to a church may not be deducted under § 170 of the Internal Revenue Code when such payments are made to receive religious services. The court concluded that such religious services constitute a "financial" benefit, a *quid pro quo*, that disallows any charitable deduction unless the taxpayer proves that the amount of the payment exceeded the value of the religious services received. *Hernandez*, 819 F.2d 1217 (6a-7a). Although the court noted that IRS valuation of religious services created "practical and constitutional difficulties" and could cause excessive entanglement in violation of the Establishment Clause, the court held that valuation of the religious services at issue here was permissible. *Id.* at 1218 (8a). In addition, the court recognized that its decision in this case cast "some doubt" as to the continuing validity of prior long-standing IRS rulings and practice allowing deduction for various payments made to receive religious services by members of other denominations. *Id.* at 1227 (27a). The panel below further held that its construction of the statute did not violate the First Amendment rights of the appellant under the Free Exercise or Establishment Clause, and that the IRS had not selectively enforced the statute in violation of the First and Fifth Amendments.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW IS ONE OF EXCEPTIONAL IMPORTANCE AND CONFLICTS DIRECTLY WITH A DECISION OF THE EIGHTH CIRCUIT

The court's decision below conflicts directly with the decision of the Eighth Circuit in *Staples v. Commissioner*, 821 F.2d 1324 (8th Cir. 1987). Indeed, it is difficult to imagine a squarer conflict since both the decision of the First Circuit below and that of the Eighth Circuit in

Staples reviewed the same Tax decision and were based on the same record. The *Staples* opinion explicitly considered and rejected the holding and reasoning of the court below.

The Eighth Circuit held in *Staples* that the appellants' payments for religious services were deductible. The court held that under IRS rulings, court opinions and the legislative history of § 170, the receipt of religious services is not the type of "material, financial or economic benefit" for which a deduction may be disallowed. The court observed that benefits from receipt of religious services are considered as a matter of law primarily to benefit the general public and only incidentally to benefit the individual participants. The court stated that:

> Religious observances of any faith are considered under the law of charity to be of spiritual benefit to the general public as well as to members of the faith, with the private benefit to the individual participants being merely incidental to the broader good that is served. . . . *The public benefit from religion remains and predominates regardless of whether church doctrines provide for traditional congregational worship or individual worship as in Scientology or whether donations are voluntary or fixed.*
>
> * * * * [R]egardless of the timing of the payment or details of the church's methods of soliciting contributions from its members, an amount remitted to a qualified church with no return other than participation in strictly spiritual and doctrinal religious practices is a contribution within the meaning of secton 170.

Id. at 1326, 1327 (emphasis added) (citations omitted).

Finally, the Eighth Circuit noted the unprecedented nature of the proposals for valuation made by the First Circuit: "No case to which we have been cited values in that manner the strictly religious practices presented by

the stipulations in this case." *Id.* at 1327. The practical and constitutional difficulties of attaching a value to a religious service led the Eighth Circuit in *Staples* to reject the government's position, concluding: "Spiritual gain to an individual church member cannot be valued at any measure known in the secular realm." *Id.*

In addition to presenting a direct conflict among the circuits, the issues raised by the decision below are of exceptional importance in the administration of the tax laws. First, unprecedented valuations of religious services for income tax purposes will be mandated; see Section IV, *infra*. Second, as is discussed in detail in Section III, *infra*, the decision below calls into question income tax deductions for payments by millions of Americans to their churches and synagogues. Third, the decision below represents a dramatic and unwarranted reversal of nearly seventy years of consistent interpretations of § 170 by the IRS to the contrary. Finally, the denial of charitable deductions here violates the religious clauses of the First Amendment.

II. THE DECISION BELOW IMPROPERLY REVERSES NEARLY SEVEN DECADES OF CONSISTENT IRS PRACTICE

For nearly 70 years, the Internal Revenue Service has allowed deductions as charitable contributions under § 170 of the Internal Revenue Code for payments made by individuals to their churches and other religious organizations in order to participate in the religious sacraments of their faith. The form of making such payments has always, prior to the decision below, been treated as irrelevant so long as the payment was for participation in religious practices. Payments for religious services have been granted deductibility by the IRS under § 170 even where the payment is fixed and/or required as a condition of receiving a religious service.

Beginning in 1919, shortly after the income tax was first enacted, the Internal Revenue Service has issued authoritative rulings and pronouncements that allow the deduction of payments for religious services regardless of the form in which the contribution is made. Accordingly, deductions have been allowed under § 170 even when receipt of religious services depends upon the payment of pew rentals, assessments or periodic dues (including tithes). *See* A.R.M. 2, 1 C.B. 150 (1919) (57a) ("In substance it is believed that these [along with 'basket collections'] are simply methods of contributing, although in form they may vary") and Rev. Rul. 70-47, 1970-1, C.B. 49 (reaffirming A.R.M. 2). *See also Staples*, 821 F.2d 1324, 1326 (explicitly refusing to follow the decision of the First Circuit below); Rev. Rul. 76-323, 1976-2 C.B. 18 (payments of entire income from required employment outside religious order made to the order as a condition of membership); Rev. Rul. 71-580, 1971-2 C.B. 235 (the benefits to a parishioner from receipt of religious services are merely incidental to the general public benefit).

The holding of the court below that an individual's receipt of a strictly religious benefit is a "financial benefit" and a "*quid pro quo*" requiring denial of the charitable deduction is, therefore, a striking departure from the Internal Revenue Service's consistent interpretation of the tax law involving payments for religious services over the past nearly 70 years. As the court noted in *Staples v. Commissioner*, 821 F.2d 1324, 1326, "[n]either the tax court nor the government has cited a case in which a taxpayer has been denied a deduction for payments keyed to participation in strictly religious practices."

The prior long-standing practice of the IRS is supported by the statute and its legislative history. Indeed, the distinction drawn by the cases and administrative rulings between payments for religious versus secular services advances the basic policies underlying the Tax

Code. Each of the prior cases denying charitable deductions to a qualified recipient has, until now, involved payments in exchange for goods or services provided in the secular or commercial marketplace. As such, each can be understood as preventing tax-exempt organizations from providing taxpayers with secular goods or services paid for with tax deductible charitable contributions and thereby preventing such tax-exempt organizations from achieving an unfair competitive advantage over taxable providers of similar goods and services.[6] *See Staples*, 821 F.2d at 1327. In addition, such a policy is necessary to preclude payments for goods and services that otherwise would explicitly be nondeductible under another provision of the Internal Revenue Code from being transformed into deductible charitable contributions.

These sound tax policy reasons for disallowing charitable deductions to the extent that the payor receives valuable secular goods and services simply do not exist where, as here, strictly religious services are involved. Practitioners of all religious denominations heretofore have enjoyed religious services by making tax deductible payments. By disallowing deduction of Scientologists' payments for their religious services, the court below has granted the IRS a license to challenge at will people's

[6] *See, e.g., United States v. American Bar Endowment*, 477 U.S. 105 (1986) (insurance); *Sedam v. United States*, 518 F.2d 242 (7th Cir. 1975) (admission to an old-age home); *Feistman v. Commissioner*, 30 T.C.M. (CCH) 590 (1971) (party following a bas mitzvah); *Murphy v. Commissioner*, 54 T.C. 249 (1970) (adoption services) (explicitly distinguishing the personal expense of adoption from a payment to participate in religious services). The Tax Court relied on only two cases, *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962) and *Haak v. United States*, 451 F. Supp. 1087 (W.D. Mich. 1978), to support its conclusion that a payment for religious services was a *quid pro quo* that should disallow the deduction. Both cases involved payments made to church schools for the secular education of the taxpayers' children. *See also Winters v. Commissioner*, 468 F.2d 778 (2d Cir. 1972) and *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972) (educational expenses).

deductions for payments to participate in religious services and overthrows seven decades of IRS practice without any sound statutory or policy basis.

III. THE DECISION BELOW GRANTS THE IRS A LICENSE SELECTIVELY TO DISALLOW INDIVIDUALS' DEDUCTIONS FOR PAYMENTS SOLELY TO PARTICIPATE IN THE RELIGIOUS SERVICES OF THEIR FAITH

No principled basis exists for distinguishing the payments of Scientologists challenged by the IRS here from a wide variety of other payments to other churches. Instead, the holding of the court below provides the IRS with a license to challenge tax deductions for payments to their churches taken by millions of religious Americans. The opinion of the First Circuit panel below, as well as those of the two other appellate courts that have affirmed the Tax Court decision at issue here, have each alluded to the potentially far-reaching implications of upholding the government's position, but none has squarely faced the challenges to other religions implied by their decisions. *See, Hernandez v. Commissioner*, 819 F.2d 1212, 1227; *Graham v. Commissioner*, 822 F.2d 844, 850; *Miller v. Internal Revenue Service*, 829 F.2d 500, 505.

Scientology's religious services are, to be sure, provided on an individual basis (as in Eastern religions, such as Buddhism and Hinduism), rather than in the more traditional congregational fashion of most Western religions. The Ninth Circuit opinion in one of the related cases indicated that Church literature suggesting that the individual "is the direct and primary beneficiary" of the religious practices that "are the fruits of his payments" renders the payments nondeductible. *Graham*, 822 F.2d at 850. Regardless of denomination, however, religious people expect substantial individual spiritual benefits to flow from participation in their religious sacraments. Expectations of individual spiritual gain from religious

giving have never before precluded deduction of payments for such services under § 170, nor should they here.

Indeed, the benefits claimed for individual Scientologists from auditing are analogous to the Christian practice of "spiritual direction." The work of spiritual guidance involves working with a spiritual preceptor who uses his or her knowledge of spiritual development to guide his or her disciple on the path to the spiritual goal. M. Eliade, *Encyclopedia of Religion*, "Spiritual Guide," Vol. 14 at 29 (MacMillan, New York 1987). This practice has prominence particularly in Catholic and Anglican (Episcopal) sects. See, for example, The Sisters of St. Joseph of Philadelphia, *The Encyclopedic Dictionary of Religion* (Wash., D.C.: Corpus Publications, Philadelphia, 1979), where "spiritual direction" is called a "form of ministry by which one person guides another in the way of evangelical perfection." In Martin Thornton, *Spiritual Direction*, 14-16 (Cowley, 1984), the author notes that ". . . spiritual direction is unashamedly individualistic because it guides and develops that individuality without which corporate action and influence by the organic Church is impossible."

Another analogous "individual" religious practice is that of confession, recognized also across religious traditions. In both Christianity and Jainism, confession to a recipient or guru is regarded as an essential element of religious practice. Eliade, *Encyclopedia of Religion*, *supra*, "Confession," Vol. 4, at 1, 4. In certain Christian practices, particularly Catholicism, failure to confess may result in estrangement from the Church as a result of exclusion from the important ritual of Eucharist. Without confession, which since the Middle Ages has been practiced in private, one cannot be a fully practicing Catholic. K. Rahner & H. Vorgrimler, Dictionary of Theology, 370-73 (NY: Crossroad, 1985) (2d ed.).

Numerous churches proselytize by telling their members that they will derive personal benefits, in terms of jobs, health and solutions to personal problems, among other benefits, from contributing to the church. (Stip. Rec. III 396-98.) Roman Catholics make gifts to their churches in the name of specific saints in order to secure benefits in the category for which that saint is the patron. *See, e.g.*, S. Wilson, *Saints and Their Churches* at 21 (Cambridge University Press). Numerous Protestant churches adhere to the concepts of "seed faith," "100-fold return," "the law of sowing and reaping," and "the law of reciprocity," all of which will result in personal salvation and other personal benefits. These denominations emphasize in their literature the personal benefits to be obtained by making payments to the Church. *See, e.g.*, O. Roberts, *Seed Faith Scriptures* (1972) and P. Cho, *Salvation, Health, Prosperity* (1987). That Scientology churches tell their parishioners that benefits from participation in religious sacraments will accrue to the individual does not distinguish Scientology from other denominations.

Neither the Internal Revenue Code nor its policies permit a distinction between individual and congregational worship in determining the allowability of a deduction for a charitable contribution under § 170. *Cf. Hernandez*, 819 F.2d at 1227 (27a) ("The IRS found significance in the fact that, unlike the collective worship services obtained in exchange for pew rents and . . . membership dues, auditing and training sessions are performed in private sessions.") Moreover, such a distinction between individual and congregational worship would advantage or disadvantage individuals based upon the religious tenets of their denomination in contravention of the First Amendment of the United States Constitution. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982) and Section V below.

Nor does the "fixed donation" form of the payment to the Scientology church accord any principled basis for distinguishing the payments at issue here from payments to religious organizations of other faiths. The decision of the courts below to disallow deduction of Scientologists' payments for their religious services here improperly elevates form over substance. *Staples*, 821 F.2d at 1327. Disallowance of deductions for payments for religious services because of the form of the payment finds no support in the Internal Revenue Code and contradicts the fundamental principle of tax adjudication that requires the substance, not the form of a transaction, to govern. *See e.g., United States v. Phellis*, 257 U.S. 156, 168 (1921) (treating the superiority of substance over form as a well-settled principle of tax adjudication).

Since 1919, when the IRS first decided to allow deductions for fixed mandatory payments to participate in religious activities, the substance, not the "form" or "structure" of a transaction has been held to govern. The Commissioner's position then, reaffirmed in 1970, remains the correct one today, despite the government's attempt to abandon it here. *See* A.R.M. 2, 1 C.B. 150 (1919), (57a) ("In *substance* it is believed that [the payment of pew rentals, assessments or periodic dues (including tithes) along with 'basket collections'] are simply methods of contributing, although in *form* they may vary") (emphasis added) and Rev. Rul. 70-47, 1970-1 C.B. 49 (reaffirming A.R.M. 2).

Comparison with the Mormon tithe may be useful. Mormons are required to tithe in accordance with the church's "worthiness" standards so that they personally will be admitted to the temple. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S.Ct. 2862, 2865 n.4 (1987). Mormon temples play a "critical role" in Mormon life, for it is in these temples that the most important rituals are performed, such as marriage, binding rites, baptisms,

of the living and the dead. While Mormons have worship chapels also, they cannot supplant or replace the temples. In order to gain admission to temples, Mormons must obtain "temple recommends." It is the standing law for membership that each Mormon "tithe," or contribute 10% of his income, to the church. This practice is enforced through the rigorous questioning of those seeking temple recommends. J. Heinerman & A. Shupe, *The Mormon Corporate Empire*, 96-97, 102-03 (1985). See also, Church of Jesus Christ of Latter Day Saints, *The Priesthood Manual* (Independence, Mo.: Herald Publishing House): Part 4 at 275: "The presenting of one's tithing statement is an act of worship.") The significant distinction between petitioner's payment and deductible tithes paid by a Mormon as a condition of admission to the temple is the individual versus congregational nature of the service. There is as much of a *quid pro quo* in one case as the other.[7]

Similarly, admission to Jewish High Holy Day services is often restricted to ticket holders. *See, e.g.*, M. Sklare, "The Sociology of the American Synagogue" in J. Neusner (ed.), *Understanding American Judaism; Toward the Description of a Modern Religion* (Anti-Defamation League of B'nai B'rith KTAV Publications, N.Y., 1975), Vol. I, at 95-96 ("While daily services, Sabbath services, and festal services are open to all, the demand for seats on the High Holy Holidays is so large that admission is commonly restricted to ticket-holders. In some congregations tickets are distributed only to

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[7] In fact, the form of payment disallowed deduction by the tax court in *Murphy v. Commissioner*, 54 T.C. 249 (1970), a case disallowing deduction for payments to receive adoption services, was equivalent to a tithe, an amount equal to ten percent of the taxpayer's income. Unlike tithes by Mormons, the taxpayer in *Murphy* received secular, not religious services.

members while in other synagogues they are sold to the public, but at a higher price than the charge made to members.") *See also*, Stip. Rec. III 387-397 (Expert testimony as to parallels among the ways more traditional churches raise funds and Scientology's system of scheduled fixed donations for certain religious services). As the IRS recognized as early as 1919, like Scientologists, religious people universally expect to receive religious benefits in exchange for contributions to their churches.

In substance, the church's practice here is not materially different from more traditional religious organizations' use of—and the Commissioner's allowance of deductions for—fixed payments on a periodic or annual basis. As the Eighth Circuit recognized, a fixed payment schedule simply may be a more effective means of fund-raising for a church that predominately provides individualized, rather than congregational, services. *Staples*, 821 F.2d at 1327-28. Although the Tax Court acknowledged that the fixed payment schedule had an historical grounding in its linkage to the income levels of the church community, *Graham*, 83 T.C. at 578 n.7 (34a), as do other more traditional religious payment schedules like the tithe, and is based on church doctrine, the court below nevertheless relied on the fixed schedule to find that the payments in this case were for a *quid pro quo* and thus nondeductible. *Hernandez*, 819 F.2d at 1216-17 (5a-6a). This elevation of form over substance is an improper interpretation of § 170, one with great potential to be used selectively—indeed misused—by the IRS to disallow deductions for payments for religious sacraments of many Americans.

IV. THE DECISION BELOW MISREADS AND IMPROPERLY EXTENDS THE 1986 DECISION OF THIS COURT IN *UNITED STATES V. AMERICAN BAR ENDOWMENT* TO REQUIRE IRS VALUATION OF RELIGIOUS SERVICES—A TASK THAT IS BOTH IMPRACTICAL AND UNCONSTITUTIONAL

The court below relied heavily on the opinion of this Court in *United States v. American Bar Endowment*, 477 U.S. 105, 106 S.Ct. 2426 (1986). *Hernandez*, 819 F.2d at 1216, 1217, 1218, and 1219 (5a, 7a, 8a, 10a-11a). However, this extension of *American Bar Endowment* to require disallowance of deductions for the purely religious services at issue here constitutes an important misapplication of that recent decision of this Court.

American Bar Endowment involved an organization (ABE) that conducted a "trade or business" unrelated to any charitable activity—the provision of group insurance policies to the organization's members. Because of certain characteristics of the members, ABE was able to obtain insurance at substantially lower cost than the members could have obtained elsewhere. Instead of lowering its rates, however, ABE gave charitable organizations the excess of the members' premium payments over the cost of providing the insurance. The only question in the case, arising under § 170 of the Code, was whether the excess payment constituted a contribution or gift deductible by the members. This Court held that the payments exceeding cost were not deductible because the members had failed to demonstrate that they could have purchased comparable insurance policies elsewhere for less than the full amount that they paid. 106 S.Ct. at 2433-34.

In *American Bar Endowment*, the payments were in exchange for receipt of a secular economic benefit: insurance services. The taxpayers claimed deduction for an alleged difference between the payment and the fair

market value of the benefit received. Here no secular economic benefit was received at all, and the analysis of *American Bar Endowment* has no application to the instant case. Mr. Hernandez, the petitioner here, received in "return" not a commercial economic product like life insurance, but instead participation in religious worship, which has no calculable financial or economic value.

Nevertheless, the court below read *American Bar Endowment* to require a determination of the monetary value of religious services received in return for a parishioner's payments. *Hernandez*, 819 F.2d at 1216-18 (5a-10a). *See also, Graham*, 822 F.2d at 849; *Miller*, 829 F.2d at 503. *Contra, Staples*, 821 F.2d at 1328. To be sure, whenever, a payment is made to a tax-exempt organization in exchange for an economic or financial benefit of "substantial" or "commensurate" value, the IRS and in turn the courts have been compelled in each case to inquire about the relationship between the amount of the payment to a tax-exempt organization and the value of the benefit received by the payor. *See, e.g., American Bar Endowment*, 477 U.S. 105; *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962) (disallowing $400 of the $1,075 claimed as a deduction for educational benefits) and *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972) (disallowing $640 of $900 claimed as a deduction for educational benefits). As the Fourth Circuit put it, the Tax Court's decision necessarily requires inquiry into the "relationship between the *quid* and the *quo*." *Miller*, 829 F.2d at 503.

The court below offered three methods for valuing religious services such as are at issue here: by looking "either to (1) the price set by the service providers, (2) the prices set by providers of similar services, or (3) the costs of providing the service." *Hernandez*, 819 F.2d at 1217 (7a). Each of these methods faces practical and constitutional obstacles.

First, valuation of services provided by a charitable organization as necessarily equal to the amount paid—as done by the court below—is contrary to IRS rulings and case law. *See, e.g.*, Rev. Rul. 67-246, 1967-2 C.B. 104, *American Bar Endowment*, 477 U.S. 105, *DeJong*, 309 F.2d 373, and *Oppewal*, 468 F.2d 1000. These cases demand that the taxpayer, the IRS and ultimately the courts place a monetary value on the services provided so that, whenever a payment to a church is in excess of the determined value of the religious services received in exchange, the donor may deduct the excess amount. As the court below acknowledged "[s]uch a case would present not only the problem of determining value but also the problem of excessive entanglement in the affairs of a religious institution." *Hernandez*, 819 F.2d at 1218 (8a). The Eighth Circuit properly rejected the suggestion that the value of the religious services could be determined from the prices set or paid:

> Furthermore, these stipulations foreclose any reliance on the Church of Scientology's fixed donations as representing the value of its essential religious practices. Under the stipulations the fixed donations are not market prices set to reap the profits of a commercial money-making venture; rather, the Church of Scientology is a bona fide church which selected fixed donations as its mechanism for raising funds from its members.

821 F.2d at 1327-28.

The second suggestion by the court below that the services may be valued by reference to "the price set by providers of similar services," *Hernandez*, 819 F.2d at 1217 (7a), is unworkable. In the case of religious services, there are no "similar services" whose prices may be ascertained. Not only are there no prices to which comparison can be made, but the very notion of comparing relative values of religious services would violate First

Amendment prohibitions on entanglement of church and state both through the valuation of religious services and the creation of denominational preferences. *See, Walz v. Tax Commissioner*, 397 U.S. 664, 674 (1970); *Larson v. Valente*, 456 U.S. 228, 234.

Finally, valuing services based on the "cost of providing the services," as suggested below, *Hernandez*, 819 F.2d at 1217 (7a) also would create both practical and constitutional difficulties. To determine the cost of providing services will require deep intrusions into a church's finances and operations. To take but one example, questions about the appropriate accounting methods for indirect costs, such as overhead, are inevitable. Excessive and unconstitutional church-state entanglement would result from such an inquiry.

The *Staples* court remarked upon the unprecedented nature of the proposals for valuation made by the First Circuit: "No case to which we have been cited values in that manner the strictly religious practices presented by the stipulations in this case." 821 F.2d at 1327. The practical and constitutional difficulties of attaching a value to a religious service led the Eighth Circuit in *Staples* to reject the government's position, concluding: "Spiritual gain to an individual church member cannot be valued by any measure known in the secular realm." *Id.*

The consistent prior practices of the IRS and the courts, and the construction urged here by petitioner—that, regardless of their form, payments for religious services are deductible under § 170 and therefore need not be valued—avoids this problem and thus is constitutionally proper, if not mandated.

V. THE DENIAL BY THE COURT BELOW OF CHARITABLE CONTRIBUTION DEDUCTIONS UNDER § 170 FOR AUDITING BY SCIENTOLOGISTS VIOLATES THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The religion clauses of the First Amendment are intended to provide comprehensive protection of religious liberty. They stand for the propositions that religious pluralism is essential to the welfare of the nation and that all citizens are entitled to protection from the imposition of an orthodoxy formulated by the government. *See, e.g., Everson v. Board of Education*, 330 U.S. 1, 8-14 (1947). *See also*, L. Tribe, *American Constitutional Law*, 814-15 (Mineola, N.Y.: Foundation Press, Inc., 1978: Supp. 1979). Broadly speaking, the Free Exercise Clause protects individuals from government interference with their religious beliefs and practices. The Establishment Clause prohibits governmental support for, control over, or inhibition of religious institutions and decisions.

In this case, the government's actions implicate both of the religion clauses. First, by taxing the plaintiff's primary religious practice, which merits treatment as a deductible activity, and which is comparable as the exercise of religion to the practices of other faiths for which the IRS has allowed deductions, the government has stated in effect that Scientology fails to satisfy the state's measure of orthodoxy. Second, by creating a denominational preference that would allow deductions for payments for congregational worship regardless of the form of payment, but not for the individual worship of Scientologists, the lower court's ruling violates the Establishment Clause. *Larson v. Valente*, 456 U.S. 228, 244; *Everson v. Board of Education*, 330 U.S. 1, 15. Further, by construing § 170 against the deductibility of payments for Scientologists' religious practices, the IRS impermissibly entangles government with religion: the IRS's interpretation of the statute requires valuation of

purely spiritual matters. *See, Walz v. Tax Commission*, 397 U.S. 664, 669 (1970) and Section IV of this petition.

The government's disallowance of charitable contribution deductions imposes a burden on the taxpayer's religious practices by subjecting them to income tax. *See Bob Jones University v. United States*, 461 U.S. 574, 603-04 (1983). Once such a burden has been shown, the government must demonstrate a compelling state interest for its actions. *Id.* at 604.

The court below misapplied the relevant constitutional standards by mischaracterizing the taxpayer as seeking special tax concessions for his payments to participate in the services of his religion. To the contrary, this case does not involve a request for exemption from taxation that members of other religions must pay. *See United States v. Lee*, 455 U.S. 252 (1982). Rather, this case involves a taxpayer who is asking only to be treated in the same manner as members of other religions have always been treated and to be granted deductions for payments to participate in the religious sacraments of his church.

The court below accepted the IRS's contention that its compelling interest was the need to maintain a sound and uniform tax system. *Hernandez*, 819 F.2d at 1225 (23a-24a); *Graham*, 83 T.C. at 583 (40a-41a). The petitioner does not question the government's interest in a sound tax system. *United States v. Lee*, 455 U.S. 252. But the government's action here achieves exactly the opposite: by denying these deductions the IRS creates unsound and unequal tax administration. The court below erred in accepting the government's assertion that the payments at issue here are distinguishable from payments to other churches, which apparently would remain deductible. Drawing such distinctions among religions coupled with

the enormous problems of valuing religious services that will be required, surely is not "sound" tax administration.

The consistent IRS practice of allowing charitable deductions for payments for religious services, regardless of their form or of their nature or value, has been sound during the nearly 70 years since the publication of A.R.M. 2 in 1919. The long-standing administrative distinction between secular and religious services is well grounded in current and historical policies of the tax code, and is a permissible accommodation of religion which has avoided excessive church-state entanglement for nearly seven decades. *See, Corporation of Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 197 S.Ct. 2862.

The decisions of the court below and of the Tax Court permit the IRS to satisfy the "compelling state interest" requirement of the First Amendment simply by claiming that any interpretation of the law advances "sound tax administration." Those holdings—if left unreviewed by this Court—will have the practical effect of exempting the administration of the tax law from the need to comply with the most fundamental constitutional requirements. The Constitution should not end where the Internal Revenue Code begins.

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 12, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 86-1276

ROBERT L. HERNANDEZ,
Petitioner, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent, Appellee.

Argued Jan. 8, 1987

Decided June 1, 1987

Before COFFIN and SELYA, Circuit Judges, and GIGNOUX,* Senior District Judge.

COFFIN, Circuit Judge.

This appeal presents the question whether a taxpayer who paid the price set by his church in exchange for specified services provided by the church is entitled to deduct the payment from his taxable income as a charitable contribution.

Robert L. Hernandez is a member of the Church of Scientology. In 1981, he paid $7,338 to the Church in

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* Of the District of Maine, sitting by designation.

exchange for Scientology services called "auditing" [1] and "training." [2] The services were offered to him at fixed prices set by the Church.[3] Hernandez deducted the $7,338 as a charitable contribution on his 1981 federal income tax return, but the Commissioner of Internal Revenue disallowed the deduction and assessed a $2,245 tax deficiency against him. The Tax Court affirmed the disallowance and deficiency assessment, and this appeal ensued.

Hernandez argues that disallowance of his deduction violates his statutory rights under section 170 of the Internal Revenue Code (Code), 26 U.S.C. § 170(c) (1987), and his constitutional rights under the Establishment

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[1] Scientologists are taught that "auditing," also referred to as "processing," "counseling," and "pastoral counselling," is a procedure through which an individual can obtain higher levels of spiritual ability and awareness. Auditing sessions are structured in accordance with the rituals and doctrines of Scientology and are generally administered in private, one-to-one sessions by specially trained Scientologists called "auditors." Stipulation #1, nos. 12-23, I Stipulated Record at 17-18.

[2] The Church of Scientology offers "training" through educational courses including (1) basic introductory courses on the doctrines and tenets of Scientology; (2) auditor training courses; (3) courses on Church management methods; and (4) general educational courses. This case involves courses in the first two categories. Scientologists are taught that spiritual gains will result from studying Scientology doctrines. Stipulation #1, nos. 24-33, I Stipulated Record at 18-21.

[3] The Church of Scientology generally requires fixed payments, often referred to as "fixed donations" for its auditing and training services. The Church offers discounts on course prices for package purchases and for advance payment. Individuals may obtain refunds on undelivered portions of auditing or training minus an administrative charge and with the proviso that the individual will not again be audited or trained. "Church of Scientology, Information, Definitions, Rules," at 6, I Stipulated Record at 48; "On Exchange," I Record Appendix at 49.

and Free Exercise clauses of the First Amendment.[4] He also claims that the Internal Revenue Service (IRS) has selectively prosecuted him because of his religion in violation of the Establishment clause and the Fifth Amendment right to equal protection of the laws. After describing the somewhat unusual procedural status of this case, we shall consider each of appellant's arguments in turn.

I. Procedural History

The parties in this case agreed to be bound, subject to the right of appeal, by the relevant factual and legal findings of the Tax Court in *Graham v. Commissioner*, 83 T.C. 575 (1984), *appeals pending*, Nos. 84-7794, 84-7798, 84-7799 (9th Cir. argued December 10, 1985), a set of three similar cases pending before the Tax Court at the time of their stipulation. The stipulation excludes "findings of fact and conclusions of law relating to any petitioner's subjective intent." The parties in *Graham* had stipulated to the record and relevant rulings in *Church of Scientology of California v. Commissioner*, 83 T.C. 381 (1984), *appeal pending*, No. 85-7324 (9th Cir. argued August 8, 1985). The *Graham* court ruled in favor of the Commissioner, and it is on the authority of that decision that the Tax Court entered its judgment of deficiency in this case. Because neither party has objected to this procedure, we adopt the records and opinions in *Church of Scientology of California* and *Graham* as part of the record before us in this case.[5]

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[4] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[5] The Tax Court allowed the Commissioner and various taxpayers to follow this same procedure in several hundred similar cases, and, as a result, appeals based largely on the same record are currently pending before all of the other federal courts of appeals except the Federal Circuit.

We will not repeat here the detailed description of Scientology and its practices recorded in the Tax Court's opinions in those cases, but will refer to the relevant findings throughout our opinion. One set of findings requires preliminary clarification. Following a fifty-one day trial, the Tax Court in *Church of Scientology of California v. Commissioner* upheld the Commissioner's revocation of the tax exemption of the Church's central branch, finding, *inter alia*, that the Church operated for a substantial commercial purpose, that its net earnings inured to the benefit of its officials, and that the Church violated public policy by conspiring, through burglaries of IRS offices and other unlawful means, to prevent the collection of taxes. In the *Graham* case and in this case, the Commissioner did not contest the taxpayers' assertions (1) that Scientology is a religion; and (2) that the Church of Scientology is a church within the meaning of section 170(b)(1)(A)(i) and a tax exempt religious organization under sections 170(c)(2), 501(a), and 501(c)(3) of the Code. Stipulation #1, nos. 52-53, I Stipulated Record at 26.[6] Although preliminary resolution of these questions might have avoided some of the constitutional questions presented in this case, it might also have involved other serious constitutional issues, and so we accept the parties stipulations for the purposes of this appeal.

II. Statutory Claim

Section 170 of the Internal Revenue Code allows a taxpayer to deduct from taxable income, any "contribution or gift to or for the use of . . . [a] corporation, trust,

[6] The Commissioner made these concessions even though the record indicates that the IRS's original reason for disallowing the deduction was that "the reported contribution was not made to a qualified organization." Supplemental Appendix at 7. The government's brief explains that the Commissioner's concessions "apparently reflected a desire to expedite these proceedings without awaiting the final outcome of *Church of Scientology*." Appellee's brief at 4 n.5.

or community chest, fund, or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals." 26 U.S.C. § 170(c). Since the Commissioner has not challenged the Church's status as a tax-exempt religious organization under the Code, the only statutory question before us is whether payments for auditing and training services are "contribution[s] or gift[s]" within the meaning of the Code. Our analysis of this question is framed by the Supreme Court's recent interpretation of the scope of the charitable contribution deduction:

> The *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration. The taxpayer, therefore, must as a minimum demonstrate that he purposely contributed money or property in excess of any benefit he received in return.

United States v. American Bar Endowment, —— U.S. ——, 106 S.Ct. 2426, 2434, 91 L.Ed.2d 89 (1986). In other words, a payment to a charitable organization is tax deductible "only if and to the extent it exceeds the market value of the benefit received" and "only if the excess payment [was] 'made with the intention of making a gift.'" *Id.* 106 S.Ct. at 2434.

The Tax Court in *Graham* found that because the taxpayers' payments to the Church of Scientology were made with the exception of receiving a commensurate return benefit, namely, auditing and training services, and because such a benefit was actually received, the payments were not charitable contributions, but rather, *quid pro quos*. Hernandez does not allege that his intentions were any different from those of the *Graham* taxpayers. Nor does he claim that he contributed money in excess of the benefit he received in return. Rather, he argues that, as

a matter of law, the return of a commensurate *religious* benefit, as opposed to an *economic or financial* benefit, cannot result in the denial of a section 170 deduction. Thus, he claims that all payments to churches for religious services—whether gifts or not—should be tax deductible under section 170.

Hernandez's position is contrary to the plain language and legislative history of section 170. Section 170 explicitly provides that payments to churches and other qualified organizations are deductible only if they are "contribution[s] or gift[s]." Though the Senate report indicates that Congress intended the phrase "contribution or gift" to include only "those contributions which are made with no expectation of a financial return commensurate with the amount of the gift," the report uses medical care as an illustration of a "financial" return. S.Rep. No. 1622, 83d Cong.2d Sess. 196, *reprinted in* 1954 U.S.Code Cong. & Admin.News 4621, 4830-31. We find no indication that Congress intended to distinguish the religious benefits sought by Hernandez from the medical, educational, scientific, literary, or other benefits that could likewise provide the *quid* for the *quo* of a nondeductible payment to a charitable organization.

Hernandez claims that while the government may assign economic value to secular benefits, it is impossible for the government to determine the economic value of religious benefits. As a practical matter, we note that the government has recognized the economic value assigned to secular services such as adoption services, symphony performances, and museum admission even though the benefits flowing from those services are, in theory, as difficult to monetarize as religious ones. *See Murphy v. Commissioner*, 54 T.C. 249 (1970) (mandatory fee paid to adoption agency is not tax deductible); Rev.Rul. 67-246, 1967-2 C.B. 104 (price of ticket to charity concert is deductible only to the extent it exceeds the value of admission); Rev.Rul. 68-432, 1968-2 C.B. 104 (cost of

museum membership is nondeductible where taxpayer enjoys free admission to poetry readings and the like). In such cases the courts and the IRS look not to the intrinsic value of the benefits, but instead either to (1) the price set by the service providers, (2) the prices set by providers of similar services, or (3) the costs of providing the service.

We find precedent for the proposition that the government may similarly recognize the economic cost of religiously-oriented services that religious organizations provide to taxpayers. In *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir.1972), we held that a payment to a parochial school was nondeductible to the extent that it was offset by the cost of providing a "religiously-oriented" education to the taxpayers' children.[7] *See also Winters v. Commissioner*, 468 F.2d 778 (2d Cir.1972); *De Jong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962). In these cases, the courts did not attempt to evaluate the secular or ecclesiastical value of a religious education; rather, they simply recognized the economic cost to the religious organization of providing the religiously-oriented benefit to the taxpayer.

Hernandez attempts to distinguish the parochial school cases by mischaracterizing the "religiously-oriented" education received as a "secular" education with "some small, unspecified element of religious teaching." Appellant's reply brief at 6-7. While it is of course true that

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[7] In *Oppewall*, we expressed our dissatisfaction with subjective inquiry into taxpayer motivation in making purported charitable contributions. 468 F.2d at 1002. After *American Bar Endowment*, however, it is clear that even when a taxpayer demonstrates that a payment to a charitable organization exceeded the economic value assigned to the return benefit, we must inquire into whether the taxpayer intended the excess payment to be a gift. 106 S.Ct. at 2434. The clarification does not affect the result in this case, for Hernandez has failed to prove *either* prong of the *American Bar Endowment* test.

substantial secular as well as religious benefits flow from a religiously-oriented education, the same is true of the training and auditing services provided in this case [8] and of other religious services. *Oppewal*, *Winters*, and *De Jong* did not, as Hernandez claims, rest on findings that the return benefits were predominantly secular. The courts in those cases did not attempt to identify and separate the religious and secular aspects of the educational benefits. Indeed, as Hernandez acknowledges, any attempt to do so would lead to excessive government entanglement with religious doctrine.

We can hypothesize cases in which a literal application of the *American Bar Endowment* test could create both practical and constitutional difficulties. Imagine, for example, a case in which the government monitored church records in an attempt to place a monetary value on the benefit of all church services, group programs, and pastoral counselling generally available to contributing members. Such a case would present not only the problem of determining value but also the problem of excessive entanglement in the affairs a religious institution. The present case, however, raises neither of these problems because (1) the Church of Scientology itself established and advertised monetary prices (fixed donations") for the services at issue; and (2) Hernandez has not argued that the prices set by the Church exceed the cost of providing the services he received or that he paid any part of the price with the intention of making a gift to the Church.

[8] Church literature states that, in addition to providing an opportunity for spiritual growth, auditing can lead to freedom from drug use, to relief from physical aches and pains, and to improved memory and communicative abilities. 73 *Gateway* at 6-7, I Stipulated Record at 95-96. Similarly, in addition to providing information about "Scientology and its general background," the Hubbard Qualified Scientologist course purchased by some of the *Graham* taxpayers "teaches one how to correctly study and what are the mechanics of learning any subject." 61 *Gateway* at 8, I Stipulated Record at 74.

On the basis of the record before us, including the factual findings of the *Graham* court, we conclude that Hernandez has failed to shoulder the burden assigned him by the Supreme Court.[9] Accordingly, we hold that the Tax Court correctly ruled that Hernandez's payments to the Church of Scientology for auditing and training services were not deductible as "charitable contributions" under section 170 of the Code.

III. The Establishment Clause Claims

Hernandez next argues that section 170, both on its face and as applied to him, violates the First Amendment's Establishment clause. We consider these claims in turn.

A. Facial Validity

Hernandez argues that section 170, on its face, creates denominational preferences of the type forbidden in *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). *Larson* held that a statute that makes "explicit and deliberate distinctions between different religious organizations," thereby communicating government endorsement or disapproval of those religions, must be subjected to strict scrutiny. 456 U.S. at 247 n.23, 102 S.Ct. at 1684 n. 23. The statute in *Larson* imposed registration and reporting requirements on religious groups that solicited more than fifty percent of their contributions from nonmembers. The Court held that the Minnesota statute violated the Establishment Clause because it distinguished, without a compelling justification, between " 'well-established churches' that have 'achieved strong but not total financial support from their mem-

[9] Though the *Graham* case was decided before the Supreme Court's opinion in *American Bar Endowment*, the Tax Court anticipated and correctly applied the *American Bar Endowment* test. Hernandez has not asked this Court to remand for reconsideration in light of *American Bar Endowment*, and we can see no purpose to be served by such a ruling.

bers,' . . . and 'churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members.' " *Id.*

The critical flaw in Hernandez's attempt to analogize his case to *Larson* is that section 1710 draws no distinctions among organizations "operated exclusively for religious, charitable, scientific, literary, or educational purposes." The statute does distinguish among types of payments, singling out contributions and gifts for special tax treatment, but we agree with the Tax Court that the "contribution or gift" requirement is a secular criterion encouraging gifts to all religious and nonreligious charitable organizations and communicating no government preference for any particular charitable organization. We therefore reject Hernandez's claim that section 170, on its face, communicates governmental preference for religious denominations other than his own in violation of the Establishment Clause.

B. Validity as Applied

Hernandez next argues that even if section 170 is facially neutral, the Tax Court applied the statute by drawing nonneutral denominational lines that discriminated against him and his church. Specifically, Hernandez claims that the Tax Court violated the Establishment Clause by discriminating against churches that conduct individual rather than congregational services and against churches that require fixed payments for services rather than relying on voluntary contributions of varying amounts.

We have carefully reviewed the *Graham* court's opinion and find no basis for Hernandez's claim that the ruling was based upon the individual nature of the auditing and training sessions. Under the Tax Court's analysis in *American Bar Endowment*, if the return benefit is commensurate with the payment or if obtaining the benefit

is the reason for making the payment, then whether the benefit is received in an individual or a group setting, the payment is a *quid pro quo* rather than a gift. 106 S.Ct. at 2434. Our own decision in *Oppewal* illustrates the point, for in that case, payments for a religiously-oriented education were held to be nondeductible personal expenses even though the educational benefit was obtained in a group, rather than an individual, setting. 468 F.2d at 1000. The number of students in the school was relevant only to the calculation of the cost per student of running the school. Where, as here, an organization calculates and sets the price to each recipient of the return benefit, any information concerning the number of persons receiving the benefit is completely irrelevant to the statutory inquiry.

In contrast, the *Graham* court did take into account the fixed and mandatory nature of the auditing and training prices in determined that the taxpayers' payments were made with the exception of receiving a commensurate return benefit. We believe that this evidence was relevant in determining both the economic value assigned to the return benefit and the taxpayers' intentions in making the payment. Indeed, we believe that evidence that a service was obtained only in exchange for a fixed payment creates, at a minimum, a rebuttable presumption that the payment was not a gift. Like the statutory distinction between gifts and other types of payments, the Tax Court's implicit distinction between fixed mandatory payments and other types of payments is neutral and expresses no disfavor for religion or for any particular religious organization.

Hernandez's argument boils down to a claim that the Tax Court's neutral interpretation of section 170 has a disparate impact upon him and, derivatively, upon his church. We note preliminarily that since the record is devoid of evidence showing that the Church of Scientology requires its members to pay more money in the nature

of fixed mandatory payments than other churches require of their members, Hernandez has failed to substantiate his claim that the Tax Court's interpretation of section 170 has a disparate impact upon Scientologists. More fundamentally, even if the Tax Court's interpretation of section 170 did have a disparate impact on Scientologists or on their church, such an impact would not invalidate a neutral interpretation of a law whose purpose or primary effect is neither approval nor disapproval of any religious denomination. The Supreme Court has repeatedly held that congressional enactments promoting the general welfare of society do not violate the Establishment Clause just because their "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." *Lynch v. Donnelly*, 465 U.S. 668, 682, 104 S.Ct. 1355, 1364, 79 L.Ed.2d 604 (1984) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442, 81 S.Ct. 1101 1113,, 6 L.Ed. 2d 393 (1961)). The same must be true of judicial interpretations of those statutes in accordance with the secular legislative intent.

The purpose and primary effect of section 170 is to encourage gifts to charitable organizations. *See* S.Rep. No. 1567, 75th Cong., 2d Sess. 14 (1938), *reprinted in* 1939—1 C.B. (Part 2) 779, 789; *Helvering v. Bliss*, 293 U.S. 144, 55 S.Ct. 17, 19 L.Ed. 246 (1934). The Tax Court's interpretation is consistent with this laudable secular goal. Thus, the law as interpreted by the Tax Court in this case is quite unlike laws whose purpose or primary effect is the establishment of religion. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed. 2d 29 (1985) (legislative history established that the sole purpose underlying Alabama's moment of silence statute was to convey a message of State endorsement and promotion of prayer in the public schools); *Larson v. Valente*, 456 U.S. at 254, 102 S.Ct. at 1688 (legislative history of Minnesota's fifty percent rule demonstrated that the provision was drafted with the explicit intention of burdening or favoring selected religious denominations). The

Tax Court's interpretation of section 170 is no more unconstitutional than section 170s' "gift or contribution" requirement or its limitation on the total amount a taxpayer may deduct,[10] though the former would have a disparate impact on a religion that prohibited giftgiving and the latter would have a disparate impact on taxpayers whose religion required them to contribute a greater percentage of their income than the statute would allow them to deduct. Any incidental disparate impact on Hernandez's religious practices or on his church stemming from the Tax Court's neutral application of section 170 is surely less significant than the impact on various religions of Sunday closing laws, *McGowan v. Maryland*, 366 U.S. at 420, 81 S.Ct. at 1101; city creche displays, *Lynch v. Donnelly*, 465 U.S. at 688, 104 S.Ct. at 1355; legislative prayers, *March v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983); and the host of other governmental actions that have survived Establishment Clause challenges before the Supreme Court. *See Lynch v. Donnellly*, 465 U.S. at 681-82, 104 S.Ct. at 1363-64 (discussing cases).

Comparing the Tax Court's interpretation of section 170 with Hernandez's proposed interpretation reveals the constitutional strength of the former and the constitutional infirmity of the latter. Hernandez proposes that all payments for religious services, whether gifts or not, be considered tax deductible contributions. In other words, he proposes that payments for religious services be treated more favorably under section 170 than payments for secular services. We cannot imagine a clearer request for government endorsement of religion. *See Wallace v. Jaffree*, 472 U.S. at 70, 105 S.Ct. at 2497 (O'Connor, J., con-

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[10] "In the case of an individual . . . [a]ny charitable contribution to . . . a church or a convention or association of churches . . . shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year." 26 U.S.C. § 170(b)(1)(A)(i).

curring) (The Establishment Clause prohibits the government from "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred:"); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985) (Connecticut statute providing employees with the absolute right not to work on their chosen sabbath violated the Establishment Clause because it commended that "Sabbath religious concerns automatically control over all secular interests at the workplace."); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 794, 93 S.Ct. 2955, 2976, 37 L.Ed.2d 948 (1973) (New York law providing tax benefits to parents of children attending nonpublic schools had the primary effect of advancing religion because, among other reasons, the benefits of the law would flow primarily to parents of children attending sectarian nonpublic schools). In contrast, like the tax exemption for property devoted to religious, educational, or charitable purposes upheld in *Walz v. Tax Commission*, 397 U.S. 664, 672-73, 90 S.Ct. 1409, 1413-14, 25 L.Ed.2d 697 (1970), section 170 as interpreted by the Tax Court does not discriminate between religion and nonreligion: gifts to all charitable organizations are tax deductible, *quid pro quo* payments are not.

Hernandez's suggestions that courts should distinguish between secular and religious services under section 170 runs afoul of the Establishment Clause in yet another way, for requiring the government to distinguish the secular from the religious would require it to engage in ongoing evaluation of the genuineness of assertedly religious services, thereby entanging itself in church doctrine. *See Lemon v. Kurtzman*, 403 U.S. 602, 619-20, 91 S.Ct. 2105, 2114-15, 29 L.Ed.2d 745 (1971) (Government evaluation of parochial school records to determine which expenditures were for secular as opposed to religious education is fraught with this sort of entanglement that the Constitution forbids."); *Presbyterian*

Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 60, 21 L.Ed.2d 658 (1969) (First Amendment prohibits civil courts from interpreting the importance of those doctrines to the religion). While the Tax Court's interpretation of section 170 could require the government to make administrative contacts with religious institutions to determine the prices the institutions have set on various religious and secular services, such administrative contact, unlike doctrinal entanglement, does not violate the First Amendment. *See Walz*, 397 U.S. at 698, n. 1, 90 S.Ct. at 1426 n. 1 (Harlan, J., concurring) (Government administration of the property tax exemption does not violate the Establishment Clause because although it involves the government in religious institutions, it does not involve "judicial inquiry into dogma and belief."); *see also Lynch v. Donnelly*, 104 S.Ct. at 1364 ("Entanglement is a question of kind and degree.")

For all these reasons we conclude that section 170, both on its face and as interpreted by the Tax Court, complies with the commands of the Establishment Clause.

IV. The Free Exercise Claim

It is clear that while the First Amendment does not require the government to provide a tax deduction for gifts to religious and other charitable institutions, *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546, 103 S.Ct. 1997, 2001, 76 L.Ed.2d 129 (1983), once the it has created such a tax benefit, the government may not condition receipt of the benefit upon the abandonment of religious beliefs or practices. *Hobbie v. Unemployment Appeals Commission of Florida*, —— U.S. ——, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 717-18, 101 S.Ct. 1425, 1431-32, 67 L.Ed.2d 624 (1981); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). As the Su-

preme Court explained in *Thomas* and recently reaffirmed in *Hobbie*,

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nontheless substantial.

Thomas, 450 U.S. at 717-18, 101 S.Ct. at 1432; *quoted in Hobbie*, 107 S.Ct. at 1049.

Hernandez attempts to fit this case into the framework established in *Sherbert, Thomas, and Hobbie* by arguing that the Tax Court conditioned his receipt of a charitable deduction for auditing and training payments upon his abandonment of the practice of a Scientology doctrine known as the "Doctrine of Exchange."[11] This doctrine, according to Hernandez, "holds that a person who does not make a contribution in exchange for something of value received will suffer spiritual decline." Appellant's brief at 27. Hernandez further asserts that 'the fixed donations' at issue in this case were established by the Church for its religious services . . . [and are] mandated by the Doctrine of Exchange." *Id.* He claims that only if he and his church abandon the Doctrine of Exchange—specifically the doctrine's requirement that the Church fixed prices for training and auditing services—can he obtain the economic benefit of a tax deduction for his auditing and training payments.[12]

[11] Hernandez also argues that the Tax Court conditioned his receipt of a tax deduction upon abandonment of his church's practice of individual, as opposed to congregational ministration. Since we have already observed that the individual nature of the training and auditing sessions played no role in the Tax Court's decision to disallow the deduction, *see supra* p. 1219, we reject this claim as groundless.

We have had some difficulty evaluating this claim. Some of our difficulty stems from discrepancies in the record concerning whether the requirement of fixed mandatory payments for training and auditing comes from religious doctrine or instead from more earthly administrative concerns. Though Hernandez asserts in his brief that the Church's requirement of fixed payments for training and auditing services is mandated by the Doctrine of Exchange, evidence in the stipulated record is inconsistent with that claim. In the *Graham* trial, Petitioner Katherine Graham explained the Doctrine of Exchange as follows:

> Well, basically, what it is is that there is flows, there is an inflow and an outflow. And if you just inflow everything and don't outflow anything, it just, it doesn't work, because eventually you will stop inflowing. In order to feel good about things, the things that you inflow, you have got to flow things out, *and it doesn't have to be money for something else, it can be anything, you know.* And its basically that is what is called exchange.
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> . . . .

[12] Hernandez has not argued that the Doctrine of Exchange prohibits him from making contributions over and above the fixed prices for training and auditing or from making other nonmandatory, nonfixed payments without receiving commensurate compensation. Thus, it appears that Hernandez is free to give "gifts," as that term has been interpreted by the Tax Court, to his church as well as to other qualified charitable organizations, and to deduct these gifts from his taxable income under section 170 without abandoning or compromising any of his religious beliefs or practices. Indeed, the record indicates that Hernandez claimed and was allowed a sixty-dollar deduction from his 1981 taxable income for other contributions to qualified organizations. Supplemental Appendix at 6.

> . . . I got Scientology auditing and I got the training. I then turned around and became more responsible and became a Girl Scout leader and flowed into the community, my help. It just—the better you become, the more able you become, the more responsible you become, the more you flow out again to things like your job, your whatever.

II Stipulated Record at 297-98 (emphasis added). Graham also testified that the Church provides some services—such as Sunday services where ministers deliver sermons, "naming" or christening ceremonies, and Friday fellowship meetings—for free. II Stipulated Record at 262-63, 275, 296. Thus, while the record indicates that the Doctrine of Exchange requires some "outflow" in exchange for services, it does not indicate that the doctrine requires "outflow" in the form of fixed monetary payments to the Church. Since the evidence in the record does not support the assertion in appellant's brief that the mandatory and fixed nature of the payments for services in this case were required by the Doctrine of Exchange, it is unclear to this court whether Hernandez's Free Exercise claim can legitimately be based on that religious doctrine. Indeed, if the Doctrine of Exchange does require Hernandez to pay an amount set by the Church for religious services, a tax deduction—an indirect subsidy returning part of that payment to him—would appear to compromise rather than to accommodate his practice of that doctrine.

These inconsistencies between the record and the assertions in appellant's brief to this court give us pause. The Supreme Court has held that conduct stemming from religious doctrine concerning the religious education and upbringing of children, *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); sabbatarian observance, *Hobbie*, 107 S.Ct. at 1049; religious dress, *Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 *Thomas*, 450 U.S. at 707, 101 S.Ct. at

1425; *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), is to be protected against all but compelling government interests. But to contemplate a particular sect's administrative or accounting modus operandi—here, the "fixed donation" system—as religious conduct sufficient to force the government to demonstrate an overriding compelling interest seems to us to trivialize the Free Exercise clause, by expanding its application in a way not remotely contemplated at any time in our history. *See Bowen v. Roy*, —— U.S. ——, 106 S.Ct. 2147, 2156 n. 17, 90 L.Ed.2d 735 (1986). Without adequate record support for this allegedly doctrinal claim, it seems "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas*, 450 U.S. at 715, 101 S.Ct. at 1431.

However, even if we assume that the fixed payments in this case were mandated by religious doctrine and that Hernandez's receipt of an income tax deduction for those payments would not infringe upon his practice of that doctrine, we doubt that by taking the fixed and mandatory nature of the payments into account in determining that they were not gifts the Tax Court burdened Herdandez's religious beliefs or practices in any constitutionally significant way. The Supreme Court cases Hernandez relies upon indicate that laws distributing government benefits trigger strict scrutiny when their indirect economic effects can be seen as pressuring individuals to violate their religious beliefs or practices. *Hobbie*, 107 S.Ct. at 1049; *Thomas*, 450 U.S. at 718, 101 S.Ct. at 1432; *Sherbert*, 374 U.S. at 404, 83 S.Ct. at 1794. We doubt that such a burden exists in this case.

It is of course true that if his claimed deduction for nongift payments for religious services were allowed, Hernandez would have more money. He could, as he suggests in his brief, use this money to purchase more auditing and training; he could use it to purchase secular

goods and services. Thus, it is clear that disallowance of the deduction has economic consequences for him. What Hernandez has failed to show is that on the facts of this case, the economic consequences, like those in *Sherbert*, *Thomas*, and *Hobbie*, put "substantial pressure on [him] to modify his behavior and violate his beliefs." *Thomas*, 450 U.S. at 718, 101 S.Ct. at 1432.

The claimant in *Sherbert* was fired from her job for refusing to work on her religious sabbath. The Supreme Court held that the state's subsequent denial of unemployment benefits

> force[d] her to choose between following their precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.

Sherbert, 374 U.S. at 404, 83 S.Ct. at 1794. Similarly, in *Thomas* a state denied unemployment benefits to a man who was fired for refusing to participate in the production of armaments in violation of his religion. The Court observed:

> "Not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of . . . religion, but the pressure upon [the employee] to forego that practice is unmistakable."

Thomas, 450 U.S. at 717, 101 S.Ct. at 1432 (quoting *Sherbert*, 374 U.S. at 404, 83 S.Ct. at 1794).

In contrast, it is difficult to see how the denial of the tax deduction at issue in this case could be seen as pressuring *Hernandez* to abandon his practice of paying "fixed donations" for training and auditing services in accordance with the Doctrine of Exchange. While Sherbert had the option of abandoning her practice of not working on Saturdays, and Thomas had the option of abandoning his practice of not producing armaments, Hernandez does not have the option of obtaining auditing and training without paying the fixed mandatory prices: the Church has offered him the services only in exchange for the advertised prices. Given the fact that Hernandez does not have the authority to avoid the fixed donation system that the Church has established for training and auditing services, the law in this case cannot fairly be seen as exerting substantial pressure upon him to do so.

Hernandez does argue that the government's disallowance of his claimed deduction pressures a *third party*, namely, the Church of Scientology, to abandon its practice of the Doctrine of Exchange with respect to training and auditing. The argument proceeds as follows: The Church's fixed price schedule for training and auditing, which is mandated by the Doctrine of Exchange, creates the presumption that payments for training and auditing are not tax deductible gifts under the Code. Since the Church relies on its members for financial support, the deductibility of the practicing members' donations to the Church is important to the Church's economic well-being. Thus, the Tax Court's interpretation of section 170 places economic pressure upon the Church to abandon the fixed donation system mandated by the Doctrine of Exchange.

The problem with this argument is that it is based upon the Church's Free Exercise rights rather than upon any rights possessed by Hernandez. Hernandez has not argued that his own religious beliefs or practices would be burdened if the Church were to abandon its fixed price schedule for training and auditing. He does not claim that he needs a fixed price schedule to practice the Doctrine of Exchange with respect to training and auditing. Therefore, so long as the Church continued to provide Hernandez with training and auditing services—and he has not argued that abandonment of the fixed donation

system would result in the termination of such services [13] —Hernandez would be free to practice the Doctrine of Exchange by contributing money in return.

The general rule is that "a litigant may only assert his own constitutional rights or immunities." *McGowan v. Maryland*, 366 U.S. at 429, 81 S.Ct. at 1107 (citing *United States v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519, 523, 4 L.Ed.2d 524 (1960)). Hernandez has not argued that the Church cannot adequately assert its own First Amendment rights. *Compare Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) (where religious institutions raised their own Free Exercise claims); *with N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (where organization was granted standing to raise the rights of its members who could not practically protect their own interests). Nor has he presented any other countervailing interests which would justify an exception to the general standing requirements. Thus, even if there were merit to the argument that section 170 unconstitutionally burdened the Free Exercise rights of the Church of Scientology, Hernandez lacks standing to make the argument.[14]

Hernandez has failed to show that the disallowance of his claimed deduction communicates any disfavor for his religious beliefs or practices. In being allowed a tax de-

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[13] Indeed, even if Hernandez had made this argument, any causal link between the disallowance of Hernandez's claimed tax deduction and the possibility that the Church might, at some point in the future, decide to stop providing training and auditing services would be too speculative to invoke the federal judicial power. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

[14] Although our view on the merit of this argument is technically dictum, we observe that any indirect economic burden on the Church's fixed donation system would certainly be outweighed by the compelling government interests discussed *infra* at 1225.

duction for gifts but not for nongift payments for services, Hernandez is receiving the same treatment as all taxpayers who obtain tax deductions for gifts but not for payment of fixed mandatory prices for religious or secular services. No special treatment of his nongift payment is warranted, for special treatment of religious claims is appropriate only where it is necessary to lift a government burden disfavoring religion. *See Wallace v. Jaffree*, 472 U.S. at 83, 105 S.Ct. at 2504 (O'Connor, J., concurring); *Bowen v. Roy*, 106 S.Ct. at 2163-64 (Stevens, J. concurring). The accommodation ordered by the Supreme Court in *Sherbert*, *Thomas*, and *Hobbie*—"the provision of unemployment benefits generally available within the State to religious observers who must leave their employment due to an irreconcilable conflict between the demands of work and conscience"—was no more than a requirement of neutrality in the face of religious differences. *Hobbie*, 107 S.Ct. at 1051 & n.11. Since Hernandez has not demonstrated that section 170 as interpreted by the Tax Court disadvantages him vis-a-vis other taxpayers making payments for religious or secular services, or that it communicates hostility toward the Scientology religion, his payments for religious services must receive the same treatment under the Code as all taxpayer *quid pro quo* payments for secular or religious services.

For the above-stated reasons, we conclude that Hernandez has not demonstrated that the Tax Court's interpretation of section 170's "contribution or gift" requirement burdens religiously mandated conduct. But if we are wrong, then we think the dimensions of such conduct have been so enlarged that government's compelling interests both in preserving the integrity of its system of financing itself and in preventing the establishment of religion justify the incidental impingement. For if sects could set up their own definitions of gifts, income, depreciation, exempt activities, etc., thereby requiring the gov-

ernment to provide them with preferential subsidies, both the fairness and the effectiveness of the revenue system would be crippled. *See United States v. Lee*, 455 U.S. 252, 259, 102 S.Ct. 1051, 1056, 71 L.Ed.2d 127 (1982) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606, 81 S. Ct. 1144, 1147, 6 L.Ed.2d 563 (1961)) ("[T]here is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'"). And if the government were lured into granting special tax deductions because of particular special tax deductions because of particular religious beliefs but for no other reasons, it would run up against the Establishment clause prohibition of religious endorsement. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. at 703, 105 S.Ct. at 2914. Granting special tax deductions for nongift payments for religious services would also undercut the legislative goal of encouraging gifts to charitable organizations: if taxpayers could obtain the charitable contribution tax benefit by making payments in exchange for services, they would lose some incentive to make payments without consideration for the use of charitable organizations. The goal of encouraging gifts to charitable organizations seems to us at least as important as a state's interest in declaring Sunday a uniform day of rest, an interest which the Supreme Court has held to be compelling enough to justify an indirect economic burden upon those who observe a Saturday sabbath. *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). For these reasons, we conclude that the disallowance of the tax deduction in this case does not violate the Free Exercise clause of the First Amendment.

V. The Selective Prosecution Claim

Finally, Hernandez claims that he is the victim of selective enforcement by the IRS. To establish his claim of religious discrimination under the First and Fifth amendments, he must prove that the IRS's decision to

prosecute him under section 170 was motivated by intentional discrimination against him because of his faith. *See Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951). *Cf. Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). We agree with the Tax Court that Hernandez has failed to carry his burden of proving discriminatory intent on the part of the IRS.

Hernandez asserts that the administrative history of the revenue ruling denying section 170 tax deductions for auditing payments contains evidence of discrimination at work." The final version of this ruling provided that

> the taxpayer is not entitled to a charitable contribution deduction for any part of the fixed donation made to the church for the auditing courses unless the taxpayer establishes that the fixed donation exceeded the monetary value of the benefits and privileges received and that the amount claimed as a charitable contribution is the amount of such excess.

Revenue Ruling 78-189, 1978-1 C.B. 68. As evidence that this determination was the product of discriminatory animus, Hernandez points first to the fact that, although an early internal draft of the ruling contained an acknowledgement that "[t]he question presented is a close one," this sentence was deleted from the final version. We disagree that this drafting process demonstrates religious bias. The fact that the IRS considered the question to be a close one and evaluated the merits of other possible resolutions suggests to us that the IRS attempted to reach a fair and correct result. We find no basis for inferring that the deletion of the quoted sentence from the final draft was anything other than a stylistic choice.

We also reject Hernandez's claim that the IRS's attempts to compare auditing to other types of services—secular and religious—and to reconcile the ruling with

its other revenue rulings under section 170 demonstrate anti-Scientology animus. The analogies to counselling and educational services, even if inexact, do not suggest bias. Like the acknowledgment that the question was "close," the internal IRS memorandum stating that an early draft of the revenue ruling was "pretty hard to distinguish" from another revenue ruling provides no basis from which to infer discriminatory bias.

Finally, Hernandez claims that intentional religious discrimination against him is evidenced by the asserted fact that the Commissioner has neither applied nor ever attempted to apply section 170 to disallow deduction of payments for religious services by members of any other religion. His assertion is plainly wrong. In *Feistman v. Commissioner*, 30 T.C.M. (CCH) 590, 59 (1972), for example, the Commissioner obtained a ruling that a payment made in exchange for a Bas Mitzvah was not deductible as a charitable contribution under section 170.[15] Similarly, cases like *Oppewal*, 468 F.2d at 1000, *Winters*, 468 F.2d at 778, and *DeJong*, 309 F.2d at 373, demonstrate that the Commissioner has prosecuted and obtained deficiency judgments against persons claiming deductions for religious education regardless of their particular religious faith. Thus, this case is different from cases like *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953), and *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed.2d 267 (1951) in which neutral laws were enforced against Jehovah's Witnesses, but not against other religious sects, because of

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[15] *See also* Rev.Rul. 76-232, 1976-1 C.B. 62: Participants in a weekend marriage seminar conducted by a charitable organization are not entitled to charitable contribution deduction for any part of a donation made to the organization at the conclusion of the seminar unless the participants establish that the amount donated exceeds the monetary value of all benefits and privileges received and that the amount claimed as a charitable contribution is the amount of such excess.

"the dislike which the local officials had of these people and their views." *Fowler*, 34 U.S. at 69, 73 S.Ct. at 527.

Equally meritless is Hernandez's claim that he is similarly situated to persons who have been allowed to deduct contributions to religious organizations made in the form of collection plate offerings or bequests for masses. *See Nelson v. Commissioner*, T.C.M. (CCH) 172 (1948), *aff'd per curiam*, 177 F.2d 203 (6th Cir.1949) (collection plate offerings); A.R.M. 2, 1 C.B. 150 (1919) (basket contributions); Rev.Rul. 78-366, 1978-— C.B. 241 (bequests for masses). Unlike the payments Hernandez made in exchange for training and auditing services, offering plate contributions are not fixed mandatory payments made in exchange for discrete services. Similarly, while the payment Hernandez made were prerequisites to his obtaining training and auditing service the payment involved in Rev.Rul. 78-366 was held to be a gift precisely because the mass would have been said as a regular part of the church's ceremony whether or not any payment had been made. The facts distinguishing this case--payment of an amount set by the Church as a prerequisite to obtaining specific services—are significant, for they created the presumption, unrebutted by Hernandez, that his payments were not "contribution[s] or gift[s]" within the meaning of the Code.

While we have some doubt as to the continuing validity of the presumption in Rev.Rul. 70-47, 170-1 C.B. 39, that pew rents and mandatory church dues are tax deductible gifts, we cannot say that the IRS distinguished those payments from the ones in issue here on the basis of religious prejudice. The IRS found significance in the fact that unlike collective worship services obtained in exchange for pew rents and, to a large degree, membership dues, auditing and training services are performed in private sessions. We have recognized that if a person pays a fixed mandatory price in exchange for services, the collective or individualized nature of those services is

irrelevant to the question of whether the payment is a gift. *See supra* p. 1219. But we agree with the Tax Court that Hernandez has failed to demonstrate that the distinction drawn by the IRS was pretextual rather than sincere and that the real basis for disallowing the deduction in this case was religious discrimination. II Stipulated Record at 181-82. Accordingly, we agree with the Tax Court's conclusion that Hernandez has failed to prove his charge of selective prosecution.

VI. Conclusion

For the reasons stated, we find that Hernandez has failed to prove that his payments to the Church of Scientology for auditing and training services are tax deductible "charitable contributions" within the meaning of the Internal Revenue Code. 26 U.S.C. § 170(c). We further hold that section 170, both on its face and as interpreted by the Tax Court, complies with the Establishment and Free Exercise clauses of the First Amendment. Finally, we conclude that the record in this case does not support the claim that Hernandez is a victim of religious discrimination by the IRS.

The tax law as applied in this case communicates no endorsement or disapproval of any religion and creates no excessive government entanglement with religious institutions. Nor does it discourage the belief in or practice of religion. Under these circumstances, the Constitution does not permit preferential treatment of religion or allow religious organizations to interfere with the sovereign's evenhanded system of financing itself. The hard fact is that although one may not consider Caesar supreme, there are some things that must be rendered unto him.

The judgment of the Tax Court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1276

ROBERT L. HERNANDEZ,
Petitioner, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent, Appellee.

DECREE

Entered: June 1, 1987

This cause came on to be heard on appeal from the United States Tax Court and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the tax court is affirmed.

By the Court:

/s/ Francis P. Scigliano
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1276

ROBERT L. HERNANDEZ,
Petitioner, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent, Appellee.

Before

Campbell, *Chief Judge*,
Coffin, Bownes, Breyer, Torruella, Selya, *Circuit Judges*,
and Gignoux,* *Senior District Judge*.

ORDER OF COURT

Entered: July 15, 1987

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

/s/ Francis P. Scigliano
Clerk

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* Of the District of Maine, sitting by designation.

APPENDIX D

UNITED STATES TAX COURT

Docket Nos. 5837-76, 9384-79, 374-80
Filed October 15, 1984

KATHERINE JEAN GRAHAM, *et al.*,[1]
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Held: The payments made by petitioners to the various churches of Scientology were not charitable contributions within the meaning of sec. 170(c), I.R.C. 1954. The remittances were made with the expectation of receiving a benefit, and such benefit was received. Thus, the transfers were in reality a quid pro quo. *Held, further*, denial of the claimed deductions did not violate any of petitioners' constitutional rights.

Robert N. Harris, Christopher Cobb, and *John E. Taussig*, for the petitioners.

James M. Kamman and *Charles Rumph*, for the respondent.

STERRETT, *Judge:* In these consolidated cases, respondent determined deficiencies in petitioners' Federal income taxes as follows:

Docket No.	*Petitioner*	*TYE Dec. 31:—*	*deficiency*	*Date of Deficiency notice*
5837-76	Katherine Jean Graham [2]	1972	$316.24	Apr. 7, 1976
9384-79	Richard M. Hermann	1975	803.00	Apr. 4, 1979
374-80	David Forbes Maynard	1977	643.00	Nov. 14, 1979

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[1] Cases of the following petitioners are consolidated herewith: Richard M. Hermann, docket No. 9384-79; David Forbes Maynard, docket No. 374-80.

[2] Petitioner Graham was unmarried during the tax year in question. Subsequently, she married, and her married name is Mrs. Elliott.

The issues before the Court are: (1) Whether payments made by petitioners to the various churches of Scientology [3] were deductible charitable contributions, and (2) whether denial of the claimed deductions would violate petitioners' constitutional rights.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulations of fact, together with the exhibits attached thereto, are incorporated herein by this reference. The parties specifically stipulated to the entire record in *Church of Scientology of California v. Commissioner*, 83 T.C. 381 (1984). All relevant findings of fact and court rulings from that case will be incorporated into this opinion. Since neither party argued to the contrary, it will be assumed that the Church of Scientology continued to operate at all relevant times in the same manner as it did in *Church of Scientology of California v. Commissioner, supra.*

For purposes of this litigation only, respondent did not contest petitioners' contentions that: (1) Scientology was at all relevant times a religion; (2) each Scientology organization to which petitioners paid money was at all relevant times a church within the meaning of section 170(b)(1)(A)(i),[4] and (3) Scientology was at all relevant times a corporation described in section 170(c)(2) and exempt from general taxation under section 501(a) as an organization described in section 501(c)(3).

Petitioners' residences at the time they filed their respective petitions in this case, and the places they filed their timely income tax returns for their respective years are as follows:

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[3] For convenience, these various churches of Scientology will be referred to as either the Church of Scientology or the Church.

[4] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954 as amended and in effect during the taxable years in issue.

Petitioner	*Residence*	*TYE Dec. 31—*	*Appropriate office of IRS*
Graham	Honolulu, HA	1972	Honolulu, HA
Hermann	Los Angeles, CA	1975	Fresno, CA
Maynard	Rialto, CA	1977	Fresno, CA

Petitioners were at all relevant times Scientologists. Scientology [5] teaches that the individual is a spiritual being having a mind and a body. Part of the mind, called the "reactive mind" is unconscious. It is filled with mental images that are frequently the source of irrational behavior. Through the administration of a Scientology process known as "auditing," an individual, called a "preclear," is helped to erase his reactive mind and gain spiritual competence. Auditing is also referred to as "processing," "counseling," and "pastoral counseling."

Scientologists believe that they can attain benefits from auditing and training, but only in degrees or steps. These include levels called "Grades" and higher levels called "OT sections." The various steps or degrees of accomplishment are set forth in a chart entitled "Classification Graduation and Awareness Chart of Levels and Certificates."

A trained Scientologist, known as an "auditor," administers the auditing. He is aided by an electronic device called an "E-meter." This device helps the auditor identify the preclear's areas of spiritual difficulty by measuring skin responses during a question and answer session. These auditing sessions are offered in fixed blocks of time called "Intensives."

One of the tenets of Scientology is that anytime a person receives something, he must pay something back. This is called the doctrine of exchange. The Church of Scientology applies this doctrine by charging a "fixed

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[5] For an indepth review of the Scientology religion and its structure, see *Church of Scientology of California v. Commissioner*, 83 T.C. 381 (1984).

donation" for training and auditing. With few exceptions, these services are never given for free.[6] Thus, fixed donations are generally a prerequisite to a person's receiving auditing and training. These fixed donation payments constitute the majority of the Church of Scientology's funds, and are used to pay the costs of church operations and activities.

The general rates of the fixed donations for auditing in 1972 were as follows:

12½-Hour intensive	$ 625
25-Hour intensive	1,250
50-Hour intensive	2,350
75-Hour intensive	3,350
100-Hour intensive	[7]4,250

In addition, the Church of Scientology offered two specialized types of auditing for a higher fixed donation—

Integrity Processing	$750 per 12½-Hour intensive
Expanded Dianetics	$950 per 12½-Hour intensive

Members of the Church of Scientology are encouraged to make advance payments for Scientology courses. If

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[6] The Church of Scientology has a nine-volume encyclopedia of Scientology policy called the OEC series. Hubbard Communications Office Policy Letter (HCO PL) Sept. 27, 1970 (Issue I), 3 OEC 89, describes the Church of Scientology's policy against free services and price cutting. It states:

Price cuts are forbidden under any guise.

1. PROCESSING MAY NEVER BE GIVEN AWAY BY AN ORG. Processing is too expensive to deliver.

* * * *

9. ONLY FULLY CONTRACTED STAFF IS AWARDED FREE SERVICE, AND THIS IS DONE BY INVOICE AND LEGAL NOTE *WHICH BECOMES DUE AND PAYABLE IF THE CONTRACT IS BROKEN.* [Emphais added.]

[7] Historically, the price of a 25-hour intensive was fixed at an amount equal to 3 months of pay for the average middle-class worker in the district of the Scientology Church providing the service.

payment is made well in advance of the services to be rendered, a discount of 5 percent can be obtained by the member. When a parishioner makes an advance payment, the Church credits his account. Once the individual begins receiving a service, his account is debited. It is the Church of Scientology's policy to refund advance payments upon request at any time before services are received.[8]

The Church of Scientology operates in a commercial manner in providing these religious services. In fact, one of its articulated goals is to make money. This is expressed in HCO PL March 9, 1972, MS OEC 381, 384. It sets out the governing policy of the Church of Scientology's financial offices by exhorting these offices to "MAKE MONEY. * * * MAKE MONEY. * * * MAKE MORE MONEY. * * * MAKE OTHER PEOPLE PRODUCE SO AS TO MAKE MONEY." The goal of making money permeates virtually all of the Church of Scientology's activities—its services, its pricing policies, its dissemination practices, and its management decisions.

The Church of Scientology promotes its services through free lectures, congresses, free personality tests, and handouts. Advertisements are placed in newspapers, magazines, and on the radio. These promotional activities are geared to be responsive to community concerns, which are determined from surveys.

In 1972, Graham made payments totaling $1,682 to the Church of Scientology, Hawaii, and to the Scientology and Dianetic Center of Hawaii. Of this amount, approximately $400 went towards training, the balance went for auditing. These payments were for the Hubbard Qualified Scientologist course (HQS), Communications course, and auditing. Some of the payments toward courses were for Graham's daughters, Karen and Laurel.

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[8] No evidence was produced with respect to the actual amounts, if any, of such refunds during the tax years in issue.

When Graham made those payments, she expected to receive, and did receive, the benefit of those services. On her 1972 income tax return, Graham deducted $1,682 as a charitable contribution.

In 1975, Hermann paid the Church of Scientology, American Saint Hill Organization (ASHO) $4,875. At the time Hermann made these transfers, he expected to receive Class 0 to 9 training. While Hermann did not take these courses, he did take other Scientology courses and has received auditing between 1974 and the present. On his 1975 income tax return, Hermann deducted $3,922 as a charitable contribution.

In 1977, Maynard paid the Church of Scientology, Mission of Riverside, $4,698.91 as advance payments for services. While Maynard did not receive any services in 1977, he made those remittances with the expectation of taking Interiorization Processing, Expanded Dianetics, and auditing. On his 1977 income tax return, Maynard claimed a $5,000 [9] charitable contribution deduction.

In the respective notices of deficiency, respondent disallowed these claimed charitable contribution deductions. Respondent maintains that it was not established that the payments to the Church of Scientology were contributions or gifts rather than payments for services or merchandise.

Issue 1. Deductibility of Payments Made

The taxpayer has the burden of proving that a particular payment is a "contribution or gift." *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934); *Welsh v. Helvering*, 290 U.S. 111 (1933); Rule 142(a), Tax Court Rules of Practice and Procedure. Petitioners argue that their remittances to the Church of Scientology met the statutory requirements of section 170, subsections (a)

[9] This amount consisted of a $2,385 carryover from 1976 transfers and $2,615 for transfers in 1977.

and (c), and thus were deductible charitable contributions. Respondent maintains that those payments were not "contribution[s] or gift[s]" within the meaning of section 170(c). Rather, he insists they were made to purchase services, i.e., a quid pro quo, and thus were nondeductible personal expenditures.

Section 170(a)(1) allows as a deduction any charitable contribution payment which is made within the taxable year. Section 170(c) defines the term "charitable contribution" as "a contribution or gift." Neither section 170 nor the regulations further elaborate on the meaning of "charitable contribution." This issue was addressed, however, in *DeJong v. Commissioner*, 36 T.C. 896 (1961), affd. 309 F.2d 373 (9th Cir. 1962). There, the Court stated—

> As used in this section the term "charitable contribution" is synonymous with the word "gift." * * * A gift is generally defined as a *voluntary transfer* of property by the owner to another *without consideration* therefor. If a payment proceeds primarily from the incentive of anticipated benefit of the payor beyond the satisfaction which flows from the performance of a generous act, it is not a gift. * * * [*DeJong v. Commissioner*, *supra* at 899. Citations omitted; emphasis added.]

Petitioners wanted to receive the benefit of various religious services provided by the Church of Scientology. The Church of Scientology, however, generally provided those services only if they were purchased. To encourage such purchases, the Church of Scientology gave a 5-percent discount to parishioners who made advance payments. A person who made an advance payment but chose not to receive the services could request a refund of his money. Petitioners thus made payments to the Church in exchange for those services.

The record demonstrates clearly that these payments were not voluntary transfers without consideration, but were made with the expectation of receiving a commensurate benefit in return. In addition, where contributions are made with the expectation of receiving a benefit, and such benefit is received, the transfer is not a charitable contribution, but rather a quid pro quo. *Haak v. United States*, 451 F. Supp. 1087, 1090-1091 (W.D. Mich. 1978).

Petitioners Graham and Hermann made payments for which they received religious services. They received a perceived benefit from their transfers. Petitioner Maynard made advance payments to the Church of Scientology. While he did not receive any religious services in 1977, his account was credited for his remittances. This credit entitled him to receipt of services in the future. It was that entitlement which constituted his receipt of a perceived benefit, or the quid pro quo.

Accordingly, none of the payments petitioners made were charitable contributions within the meaning of section 170(c). Instead, they were nondeductible personal expenditures.

Issue 2. Constitutional Arguments

Petitioners maintain that denial of the deduction interferes with their constitutional right to the free exercise of their religion. It is well established that there is no constitutional right to a tax deduction. Benefits granted to taxpayers, such as deductions for charitable contributions, are matters of legislative grace. *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593 (1943); *New Colonial Ice Co. v. Hervering*, *supra* at 440; *Winters v. Commissioner*, 468 F.2d 778, 781 (2d Cir. 1972), affg. a Memorandum Opinion of this Court. Further, denial of this deduction does not violate the free exercise clause of the First Amendment. *Parker v. Commissioner*, 365 F.2d 792, 795 (8th Cir. 1966), cert. denied 385 U.S. 1026 (1967); *Winters v. Commissioner*,

supra at 781. The constitutionality of the denial of this deduction was well stated by the Supreme Court in *Cammarano v. United States*, 358 U.S. 498, 513 (1959)—

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. * * *

Respondent is not precluding petitioners from engaging in constitutionally protected activities. Petitioners may practice their beliefs; they just will not be subsidized for them.

Even if denial of the deduction interfered with petitioners' practice of their religious beliefs, not all burdens on religion are unconstitutional. *United States v. Lee*, 455 U.S. 252, 257 (1982). See also, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 163-166 (1944); *Reynolds v. United States*, 98 U.S. 145, 166-167 (1878). The limitation on religious liberty can be justified by showing that it is essential to accomplish an overriding governmental interest. *United States v. Lee*, *supra* at 257-258. The Supreme Court has stated that "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." *United States v. Lee*, *supra* at 260.

Petitioners also argue that denial of the deductions violates the establishment clause of the First Amendment.[10] Their argument is twofold. First, disallowance

[10] Petitioners raised similar establishment clause arguments in *Church of Scientology of California v. Commissioner*, 83 T.C. at 447-454. While that case dealt with the constitutionality of sec. 501(c)(3), its rationale is fully applicable to sec. 170 and we incorporate herein by this reference that portion of the opinion.

would result in disparate treatment of petitioners, in violation of the neutrality requirement of the First Amendment. Second, disallowance would be the result of excessive Government entanglement with religion, in violation of the First Amendment.

Petitioners place heavy emphasis on *Larson v. Valente*, 456 U.S. 228 (1982). In that case, Minnesota had enacted a statute imposing registration and reporting requirements on religious groups which solicited more than 50 percent of their contributions from nonmembers. The Supreme Court held that the statute violated the establishment clause of the First Amendment. In so doing, they rejected an argument that the statute was facially neutral and found instead that it made "explicit and deliberate distinctions between different religious organizations." *Larson v. Valente, supra* at 247 n. 23. The Court further mentioned that "The fifty percent rule of section 309.515, subd. 1(b), effects the *selective* legislative imposition of burdens and advantages upon particular denominations." *Larson v. Valente, supra* at 253-254.

The instant case is distinguishable from *Larson* because section 170, unlike the charitable solicitation law in *Larson*, does not make classifications among religions. Furthermore, unlike *Larson*, here there is no legislative history revealing overt discrimination. Finally, even if section 170 has the effect of advancing one religion more than another, that fact alone does not make the statute unconstitutional. The establishment clause does not prohibit a statute from having a disparate impact on religious organizations provided the disparate impact results from the application of secular criteria. *Lynch v. Donnelly*, 465 U.S. ——, —— (1984); *Gillette v. United States*, 401 U.S. 437, 452 (1971); *McGowan v. Maryland*, 366 U.S. 420, 442-444 (1961). Here the tests for determining the deductibility of claimed charitable contributions are based on secular criteria. Further, *Larson* is

distinguishable from the case at bar because the section 170 classification bears equally upon all religious organizations. Thus, there is not the political divisiveness here that was prevalent in *Larson*. Accordingly, the argument of unconstitutionality under the establishment clause is rejected.

Finally, petitioners insist that denial of the claimed deductions was due to selective discriminatory action. They claim that their rights under the First Amendment and the equal protection component of the due process clause of the Fifth Amendment were violated. The evidence in this case does not demonstrate that any discriminatory action was taken against petitioners by respondent or any of his agents. Petitioners have failed to prove that violation of their rights occurred under either the First or Fifth Amendments.[11]

Decisions will be entered for the respondent.

[11] This issue of selective enforcement was also raised and rejected in *Church of Scientology of California v. Commissioner*, 83 T.C. at 453-454.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-275

ROBERT L. HERNANDEZ,
Applicant,

v.

COMMISSIONER OF INTERNAL REVENUE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 12, 1987.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 6th day of October, 1987.

APPENDIX F

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

Docket No. 13620-84

ROBERT L. HERNANDEZ,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER AND DECISION

After due consideration of petitioner's Motion for Entry of Final Decision filed December 2, 1985, respondent's Notice of Objection filed December 23, 1985, and petitioner's Response to Notice of Objection filed January 7, 1986, and on the authority of *Graham v. Commissioner*, 83 T.C. 575 (1984), on appeal (9th Cir., Nov. 19, 1984), it is

ORDERED that petitioner's above-referenced Motion for Entry of Final Decision is granted. It is further

ORDERED and DECIDED that there is a deficiency in petitioner's income tax for the taxable year 1981 in the amount of $2,245.00.

/s/ Samuel B. Sterrett
SAMUEL B. STERRETT
Chief Judge

Entered: Mar. 6, 1986

APPENDIX G

UNITED STATES TAX COURT

Docket No. 13620-84

ROBERT L. HERNANDEZ,
Petitioner(s),

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION

It is hereby stipulated by and between Petitioner(s) and Respondent, by their respective counsel of record, that they will be bound herein by any relevant findings of fact and conclusions of law made by the Court in its opinions and decisions in three certain 'test' cases, namely, Docket Nos. 5837-76, 9384-79 and 374-80, to the extent that such findings of fact and conclusions of law shall have been actually briefed, argued and submitted in the said 'test' cases, and have been based upon stipulations and/or undisputed facts therein, excluding, however, findings of fact and conclusions of law relating to any petitioner's subjective intent.

It is understood and agreed that nothing in this stipulation, or in any order based hereon, shall in any way be construed as waiving or changing the venue of any appeal from decision herein, as provided in IRC § 7—82 (b)(1)(a); and that to the extent relevant the records in the said Docket Nos. 5837-76, 9384-79 and 374-80 shall

be deemed part of the record herein for purposes of any such appeal.

FRED T. GOLDBERG, JR.
Chief Counsel
Internal Revenue Service

By /s/ Dorothy W. Westover
Dorothy W. Westover
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Tel. No. (213) 688-4636

Counsel for Respondents

Dated: 28 Jun. 1984

/s/ Tobias C. Tolzmann
5564 Kawaikui Street
Honolulu, Hawaii 96821
(808) 373-1554

Counsel for Petitioner(s)

Dated: June 21, 1984

APPENDIX H

UNITED STATES TAX COURT

Docket No. 5837-76

KATHERINE JEAN GRAHAM,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

[Filed Dec. 6, 1982]

STIPULATION #1

In accordance with Tax Court Rule 91, the parties hereby stipulate the matters hereinafter stated, subject to the rights of the parties to introduce other and further evidence not inconsistent herewith and reserving to each of the parties the right to object to the materiality or relevance hereof in whole or in part.

1. Petitioner maintained her legal residence at 743 Pumehana, Hawaii, at the time of the filing of the petition herein.

2. Petitioner filed a timely Federal Income Tax return for the taxable year ending December 31, 1972, a true and correct copy of which is attached hereto and marked as Joint Exhibit 1-A.

3. Petitioner's income tax return for said taxable year was examined by respondent, who, on April 7, 1976, issued a notice of deficiency, a true and correct copy of

which is attached hereto and marked as Joint Exhibit 2-B.

4. Petitioner claimed a charitable contribution deduciton under I.R.C. § 170 for $2,379.50 transferred to the Church of Scientology of Hawaii and to the Scientology and Dianetic Center of Hawaii.

5. Each of Exhibits C through Q is a document received by petitioner from the Church of Scientology of Hawaii or from the Scientology and Dianetics Center of Hawaii, reflecting transactions of petitioner with one or the other of them.

6. During November of 1972, petitioner paid $200.00 to the Church of Scientology of Hawaii for Auditing, which payment is not reflected on respondent's Exhibits C through Q.

7. The neologisms "Scientology" and "Dianetics" were introduced by L. Ron Hubbard. Mr. Hubbard wrote *Dianetics: The Modern Science of Mental Health*, which was published in 1950 and which sets forth the general principles of Dianetics and Dianetic Auditing as discovered and developed to 1950.

8. Some of the beliefs and practices of Scientology are roughly described in lay terms in *Scientology, A World Religion Emerges in the Space Age*, a book copyrighted by L. Ron Hubbard. Respondent's Exhibit R attached hereto is a true copy of said book. Petitioner objects to said exhibit on grounds of relevance, hearsay and the first amendment.

9. The Church of Scientology of Hawaii is, and is considered by the Churches of Scientology to be, a church of the kind referred to by Scientologists as a "Class IV Church" or "Class IV Org." The Scientology and Dianetics Center of Hawaii is, and is considered by Churches of Scientology to be, a church of the kind referred to by Scientologists as a "Mission."

10. There are many churches and missions in the United States and in other countries which practice, teach and promulgate Scientology. As used herein, "Churches of Scientology" refers collectively to such churches and missions, and "Scientologist" refers to members of such churches and missions.

11. The Churches of Scientology, including the Church of Scientology of Hawaii and the Scientology and Dianetics Center of Hawaii, follow common doctrines, practices and beliefs of Scientology.

12. The Churches of Scientology offer Auditing and courses to Scientologists.

13. Auditing, also variously referred to as "processing," "counselling" and "pastorial counselling," is conducted by a specially trained Scientologist, referred to as an "Auditor."

14. Auditing is generally conducted in a private session one to one, between the Auditor and the person being Audited.

15. Every Auditing session is structured and conducted in exact accordance with rituals, codes, doctrines and tenets of Scientology.

16. Scientologists are taught that the individual is an immortal spirit who has a mind and a body. Scientologists are also taught that the highest level of spiritual ability and awareness can be attained only by progressing on a step by step basis through lower and intermediate levels of Auditing.

17. The structure, ritual and content of each Auditing session are determined by the level of attainment of the Scientologist being Audited.

18. Some of the rituals used in Auditing include questions, commands and drills.

19. The Auditor acknowledges the response of the person being Audited, but offers no analysis of the response to the person being Audited.

20. An E-Meter is a device used in Auditing.

21. Auditing is delivered in sessions. An "Intensive" is a specific number of hours of Auditing intended to be given over a short period of time. An intensive is 12½ or 25 hours of Auditing and usually involves 12½ hours of Auditing.

22. An Auditor who conducts a session is expected to know and understand the rituals, codes, tenets and doctrines of Scientology applicable to the conduct of Auditing generally and to have mastered the particular material to be used in the session.

23. No subject matter is taught, studied or learned during an Auditing session (except that the Scientologist being Audited necessarily learns and understands the particular practice used in the session).

24. The Churches of Scientology offer courses to provide training in the doctrines, tenets, codes, policies and practices of Scientology and to train Scientologists as Auditors.

25. Training is delivered to Scientologists under the supervision of a trained Scientologist. Training is delivered in courses each of which includes specific material to be mastered by the students in order to complete the course. Courses range from basic courses which introduce the doctrines and tenets of Scientology through courses which train and qualify Auditors to deliver Auditing at the highest levels.

26. It is a doctrine of Scientology, and Scientologists are taught, that spiritual gains result from the study and understanding of the doctrines, codes and tenets of

Scientology, whether or not the student receives Auditing.

27. Scientologists believe that they can attain benefits from Auditing, but only in degrees or steps. These include levels called "Grades" and higher levels called "OT Sections."

28. Respondent's Exhibit S attached hereto is a copy of a document headed "THE BRIDGE" which was published by the Church of Scientology of California. Petitioner objects to said exhibit on grounds of relevance, hearsay and the first amendment.

29. In contrast to Auditing, Auditor training and other courses furnished by the Churches of Scientology are instructional or educational; the student is expected to understand and learn the material which is the subject matter of the particular course he or she takes. As used herein, "course" means and refers to such services and not to Auditing. Some courses include Auditing by students and Auditing of students.

30. The Churches of Scientology deliver Auditing and training at various levels. A Scientologist who receives Auditing begins at the lowest level and progresses step by step to higher and higher levels. A Scientologist who receives training also begins at the lowest level and progresses step by step to higher and higher levels. Only Auditors who have been qualified by training at an appropriate level can deliver Auditing at that level.

31. Some of the Churches of Scientology also deliver administrator and executive training courses. The students in such courses are taught the management methods and policies of the Churches of Scientology, and are mostly staff members of the Churches of Scientology. Such courses are occasionally taken by Scientologists who are not staff members. The subject matter of such courses includes Scientology doctrines, tenets and codes

which are applicable to the administration and management of Scientology organizations.

32. The Churches of Scientology also deliver a few short courses of a general educational nature, designed to remedy educational deficiencies and to teach Scientology study methods, to enable the student to progress more rapidly in Scientology courses.

33. All of the courses offered by the Churches of Scientology are founded upon the doctrines and tenets of Scientology, in the manner of presenting the material studied and in the instructional methods.

34. The Scientology and Dianetic Center of Hawaii offers Auditing at Grades I through IV.

35. The Church of Scientology of Hawaii offers Auditing from Grade I through Grade IV and Auditor training from Class I through Class IV.

36. The Churches of Scientology have established charges for Auditing and for courses they deliver, and refer to payments of such charges as "fixed donations" or "fixed contributions." Such payments are hereinafter referred to as "fixed donations."

37. Fixed donations are sometimes made for an Intensive of 12½ or 25 hours of Auditing.

38. Respondent's Exhibit T attached hereto is a copy of a schedule of fixed donations and book order form, copyrighted by L. Ron Hubbard and published by the Church of Scientology of California. Petitioner objects to said exhibit on grounds of relevance, hearsay and the first amendment.

39. Fixed donations constitute the source of most of the funds of the Churches of Scientology. Their only other source of funds is from sales of Scientology literature, tapes of lectures by L. Ron Hubbard (the founder of Scientology) and artifacts.

40. The payments made by petitioner were fixed donations.

41. The Churches of Scientology do not actively solicit contributions from their members or from the public, other than fixed donations.

42. Petitioner first became a Scientologist in 1971 when she attended activities of the Scientology and Dianetics Center of Hawaii.

43. The Hubbard Qualified Scientologist Course (HQS) is an introductory course, one purpose of which is to familiarize the student with certain basic techniques used in Auditing.

44. Respondent's Exhibit U attached hereto is a copy of a pamphlet copyrighted by L. Ron Hubbard and published by the Church of Scientology of California. Petitioner objects to said exhibit on grounds of relevance, hearsay and the first amendment.

45. The Communications Course is an introductory course one purpose of which is to introduce those unfamiliar with Scientology to certain concepts of Scientology.

46. Respondent's Exhibit V attached hereto is a copy of a pamphlet copyrighted by L. Ron Hubbard and published by the Church of Scientology of California. Petitioner objects to said exhibit on grounds of relevance, hearsay and the first amendment.

47. The Communications Course referred to in respondent's Exhibit H was attended by petitioner's daughter, Karen.

48. The Communications Course referred to in respondent's Exhibit I was attended by petitioner's daughter, Laurel.

49. The Hubbard Qualified Scientologist Course referred to in respondent's Exhibit J was attended by petitioner's daughter, Karen.

50. The Hubbard Qualified Scientologist Course referred to in respondent's Exhibit K was attended by petitioner's daughter, Laurel.

51. Respondent's Exhibits W through AQ attached hereto are copies of documents, each of which was published and/or copyrighted as follows:

W Two page flyer, first page headed "Knowledge Services—Books," published by ASHO (Church of Scientology of California) and copyrighted by L. Ron Hubbard.

X Booklet entitled "Scientology & Dianetics," published by Church of Scientology of California.

Y Magazine, the cover of which is missing, published by the Founding Church of Scientology of Washington, D.C. and commencing with an article entitled "The Dangerous Environment."

Z Booklet entitled "Church of Scientology Information, Definitions, Rules," copyrighted by L. Ron Hubbard.

AA Flyer Entitled "Gain Respect for Self and Others Through Scientology Training," published by the Los Angeles Organization (Church of Scientology of California) and copyright by L. Ron Hubbard.

AB Flyer entitled "Your Road to Total Freedom," published by Church of Scientology of California and copyrighted by L. Ron Hubbard.

AC Flyer commencing with excerpts titled "On Exchange," published by the San Francisco Or-

ganization (Church of Scientology of California) and copyright by L. Ron Hubbard.

AD Flyer entitled "Scientology Auditing gives you a chance to handle your environment better," published by The Church of Scientology Foundation (Church of Scientology of California) and copyright by L. Ron Hubbard.

AE Booklet entitled "Your Road to Clear Goes Through ASHO Foundation," published by Church of Scientology of California and copyrighted by L. Ron Hubbard.

AF Magazine entitled "Advance," Issue 18, published by the Advanced Organization (Church of Scientology of California) and copyright by L. Ron Hubbard.

AG Magazine entitled "Advance," Issue 19, published by the Advanced Organization (Church of Scientology of California) and copyright by L. Ron Hubbard.

AH Magazine entitled "Gateway," Issue 61, published by the Church of Scientology in San Francisco (Church of Scientology of California) and copyright by L. Ron Hubbard and copyright by L. Ron Hubbard.

AI Magazine entitled "Gateway," Issue 73, published by the Church of Scientology in San Francisco (Church of Scientology of California).

AJ Magazine entitled "THE AUDITOR: The Monthly Journal of Scientology," Issue 92 Worldwide, published by New American Saint Hill Organization (Church of Scientology of California) and copyright by L. Ron Hubbard and copyright by L. Ron Hubbard.

AK Magazine entitled "THE AUDITOR: The Monthly Journal of Scientology," Issue 91 Worldwide, published by New American Saint Hill Organization (Church of Scientology of California).

AL Magazine entitled "Cause," Issue 26, published by ASHO Foundation (Church of Scientology of California) and copyright by L. Ron Hubbard.

AM Magazine entitled "Cause," Issue 26, published by ASHO Foundation (Church of Scientology of California) and copyright by L. Ron Hubbard.

AN Magazine entitled "Clear News," Issue 107, published by AOLA (Advanced Organization, Los Angeles—Church of Scientology of California) and copyright by L. Ron Hubbard.

AO Magazine entitled "Clear News," Issue 104, published by AOLA (Advanced Organization, Los Angeles—Church of Scientology of California) and copyright by L. Ron Hubbard.

AP Magazine entitled "Realty," Major Issue 96, published by Church of Scientology of California and copyright by L. Ron Hubbard.

AQ Magazine entitled "Realty," Issue 102, published by Church of Scientology of California.

Petitioner objects to each of said exhibits on grounds of relevance, hearsay and the first amendment.

52. Respondent has not contested and will not contest, but only for the purposes of this litigation, petitioner's contention that Scientology was at all relevant times a religion.

53. Respondent has not contested and will not contest, but only for the purposes of this litigation, petitioner's contention that each Scientology organization to which

petitioner paid money was at all relevant times a church within the meaning of I.R.C. § 170(b)(1)(A)(i), a corporation described in I.R.C. § 170(c)(2) and exempt from general income taxation under I.R.C. § 501(a) as an organization described I.R.C. § 501(c)(3).

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APPENDIX I

A.R.M. 2, 1 C.B. 150 (1919)

Section 214 (a) 11, Article 251: Charitable contributions.

The Committee is of the opinion that the distinction of pew rents, assessments, church dues, and the like from basket collections is hardly warranted by the act. The act reads "contributions" and "gifts." It is felt that all of these come within the two terms.

In substance it is believed that these are simply methods of contributing, although in form they may vary. Is a basket collection given involuntarily to be distinguished from an envelope system, the latter being regarded as "dues"? From a technical angle, the pew rents may be differentiated, but in practice the so-called "personal accommodation" they may afford is conjectural. It is believed that the real intent is to contribute and not to hire a seat or a pew for personal accommodation. In fact, basket contributors sometimes receive the same accommodation informally. On these grounds, the Committee is of the opinion that ordinarily and customarily pew rents, as well as so-called assessments and so-called dues, are to be regarded as contributions.

It is accordingly recommended that this interpretation be adopted.